85-1801

No. 85-_____

Supreme Court, U.S.
FILED
APR 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PATRICIA LARSON, DARROLD LARSON, DAVID PENCE, TERRI CARLSON, JOHN ROBERTSON, ROBYN ROBERTSON, LORALEE ISAACSON, DIRECTORS OF FM WOMEN'S HELP AND CARING CONNECTION, d.b.a. WOMEN'S HELP CLINIC,

Appellants,

v.

FARGO WOMEN'S HEALTH ORGANIZATION, INC., ROBERT LUCY, M.D., GEORGE MIKS, M.D., AND JANE DOE,

Appellees.

On Appeal From The North Dakota Supreme Court

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

A preliminary injunction was issued restricting advertisements and counseling practices of a prolife counseling center which operates on a totally noncommercial basis.

1. May a state constitutionally apply commercial false advertising laws to noncommercial advocacy speech?

2. Is North Dakota Century Code § 32-06-02 unconstitutional as applied because it allows a state court to issue a preliminary injunction restricting noncommercial advocacy speech based solely on the sufficiency of the allegations of the pleadings?

PARTIES

All parties are listed in the caption.

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No. 85-_____

PATRICIA LARSON, DARROLD LARSON, DAVID PENCE, TERRI CARLSON, JOHN ROBERTSON, ROBYN ROBERTSON, LORALEE ISAACSON, DIRECTORS OF FM WOMEN'S HELP AND CARING CONNECTION, d.b.a. WOMEN'S HELP CLINIC,

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Appellees.

JURISDICTIONAL STATEMENT

INTRODUCTION

This is an appeal of a preliminary injunction that restricts the counseling and advertisements of a prolife, crisis pregnancy counseling center in Fargo, North Dakota. Appellants respectfully appeal the judgment and opinion of the North Dakota Supreme Court issued in this proceeding on January 7, 1986.

OPINIONS BELOW

The opinion of the North Dakota Supreme Court, which appears in the Appendix at 1a, is reported at 381

N.W.2d 176. The preliminary injunction issued by North Dakota District Judge John Garaas is unreported and appears in the Appendix at 25a.

JURISDICTION

This case was decided and judgment entered by the North Dakota Supreme Court on January 6, 1986. The jurisdiction of this Court is invoked under Title 28 of the United States Code § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> Congress shall make no law . . . abridging the freedom of speech or of the press . . . .

North Dakota Century Code § 32-06-02:

> Injunction—In what cases granted—An injunction may be granted in any of the following cases:
>
> 1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the plaintiff.

North Dakota Century Code § 51-12-01:

> False and misleading advertising prohibited. No person, firm, corporation, or association with intent to sell, dispose of, increase the consumption of, or induce the public to enter into an obligation relative to, or to acquire title or interest in any food, drug, medicine, patent and proprietary product, merchandise, security, service, medical treatment, paint, varnish, oil, clothing, wearing apparel, machinery, or anything offered to the public, shall make, publish, disseminate, circulate, or place

before the public, or directly or indirectly shall cause to be made, published, disseminated, circulated, or placed before the public in a newspaper, or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, tab, label, letter, or in any other way, an advertisement which contains any assertion, representation, or statement of fact, including the price thereof, which is untrue, deceptive, or misleading regarding such food, drug, medicine, patent and proprietary product, merchandise, security, service, medical treatment, paint, varnish, oil, clothing, wearing apparel, machinery, or anything offered to the public.

North Dakota Century Code § 51-12-08:

False Adversiting—Generally. It is unlawful for any person with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, any statement concerning such real or personal property or services, professional or otherwise or concerning any circumstances or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.

STATEMENT OF THE CASE

This case concerns the legal efforts of the abortion clinic in Fargo, North Dakota, to restrict the advertising of a prolife crisis pregnancy counseling center there. The trial

judge issued a preliminary injunction against the prolife center, based solely on the sufficiency of the allegtions of the abortion clinic's pleadings. This injunction severally restricts the advertising and counseling practices of the prolife center. The North Dakota Supreme Court upheld the injunction.

Appellants operate the FM Women's Help and Caring Connection, Inc., known since February, 1984 as the Women's Help Clinic. App. at 49a. [Hereinafter we refer to the Women's Help Clinic, and to the appellants generally, as the prolife clinic]. The counselors at the prolife clinic offer free pregnancy tests and counsel women about their pregnancies, including pregnant women considering abortion. *Id.* The prolife clinic offers all of its services for free, and operates on a non-profit basis. *Id.*

The prolife clinic operates under a prolife, anti-abortion philosophy. *Id.* The directors and counselors at the clinic operate it as an expression of their political, moral and religious beliefs that abortion is morally wrong and that they, as Christians, must help those in need. *Id.* The counselors at the prolife clinic could not refer pregnant women to an abortion clinic, because of the counselors' prolife convictions. App. at 49a-50a.

The prolife clinic does not charge for its services. App. at 49a. The prolife clinic advertises its free services in the *Fargo Forum*. App. at 50a. The content of the prolife clinic's advertisement reflects and is in furtherance of their political, moral and religious position, that abortion is wrong. *Id.*.

Since approximately April 14, 1984, approximately ten months before this lawsuit was filed, the *Fargo Forum* has required prolife clinics to include the words, "pro-life" in their newspaper ads, and has also required the abortion

providers to put the words, "pro-choice" in their newspaper ads. *Id.* The *Fargo Forum* officials decided that these words would communicate to the readers that appellees' facility performs abortions, while the appellants counseled against them. *Id.*[1]

The one abortion clinic in Fargo is called the Fargo Women's Health Organization, Inc. It is the only abortion clinic in Fargo, App. at 52a, and is one of the appellees in this suit. [Hereinafter, we refer to this corporation and to the appellees generally as "the abortion clinic"]. The abortion clinic claims that members of the community frequently refer to it with various names, to wit: the Women's Health Clinic, Women's Health Center, Women's Health Organization Clinic and Women's Clinic. There is no claim by the abortion clinic that it has ever used these names to refer to itself. The abortion clinic has performed approximately 3,000 abortions since opening. App. at 54a.

The abortion clinic, its two doctors, Robert Lucy, M.D., and George Miks, M.D., and an imaginary woman, "Jane Doe," filed suit against the prolife clinic on January

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[1] The prolifers' ads which appeared in the *Fargo Forum* before the district court's preliminary injunction, read as follows:

Contemplating Abortion?
Call Us First For Your Protection
- Confidential—we don't trace calls
- Financial assistance
- Free pregnancy test
- Indecision counseling—Pro-life
- Services performed by licensed physicians

701-232-2716
Answered 24 hours a day
CALL TOLL FREE
ND 1-800-732-2422
MN SD 1-800-362-3145

11, 1985, App. at 56a. In the first cause of action, the abortion clinic alleged that the prolife clinic holds itself out to the public as a provider of elective abortion services, App. at 56a, and that such advertising is untrue, deceptive and misleading. *Id.* This allegation was made approximately ten months after the *Fargo Forum* required the prolife clinic to include the words "pro-life" in each of its ads. The prolife clinic denies that it uses deceptive or misleading advertisements.

The abortion clinic alleges that the prolife clinic intentionally and knowingly placed the ads that they did to deceive and mislead pregnant women who wanted abortions. *Id.* The abortion clinic further alleges that the deception comes about because the names of the two clinics are similar. App. at 51a. The abortion clinic alleges that the prolife clinic knowingly selected a name similar to the abortion clinic, to confuse pregnant women. App. at 58a. The abortion clinic alleges that the counselors at the prolife clinic intentionally fail to inform callers that their center is not an abortion clinic. *Id.*

In the second cause of action, a plaintiff denominated "Jane Doe"[2] sued the prolife counseling clinic for intentional infliction of emotional distress. App. at 59a. "Jane

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[2] Appellees use the term "Jane Doe" in two totally different and confusing contexts. The attorneys for the abortion clinic presented 4 affidavits by Jane Does I, II, III, and IV. These four purport to be real people who are known to the appellees and their lawyers. They have used the pseudonyms to protect their identity. However, the appellees' lawyers also named one of the plaintiffs "Jand Doe" and the plaintiff is not a real person. "She" is a fictitious party. Plaintiff Jane Doe is an imaginary person. While appellees' lawyers believe a woman fitting her description *may* exist, they do not know if any such person really exists, nor have they been requested to file this second cause of action by any real person.

Doe" is an unknown pregnant woman. *Id.* Appellees' attorneys do not know whether she exists or not.

Appellees' attorneys allege that the prolife clinic tricked "Jane Doe" into coming to their center, when Jane Doe really wanted to go to the abortion clinic. App. at 59a. Appellees' attorneys allege that the prolife clinic never indicated to "Jane Doe" that it was not an abortion clinic and never informed "Jane Doe" that the clinic did not perform abortions until after the time in which "Jane Doe" could legally and safely have an abortion, so that she gave birth to her child. *Id.*

The abortion clinic filed a motion for a Temporary Restraining Order on January 3, 1985, App. at 61a. They sought to enjoin the prolife clinic from using the name, "Women's Help Clinic," and from falsely advertising that they run an abortion clinic. *Id.* They further requested that appellants be ordered to direct any person contacting them for abortion services to the abortion clinic until such time as the court orders otherwise, App. at 61a, and that the court award damages and attorneys' fees against the appellants. App. at 62a.

On February 22, 1985 the district court held a hearing on the motion for a temporary restraining order (which the court properly renamed a motion for a preliminary injunction). Also heard were appellants' motions to dismiss the case.

The appellants argued, among other things, that their counseling and advertisements were protected, noncommercial advocacy speech under the First Amendment. The prolife clinic also argued that a preliminary injunction issued against them would operate as an unconstitutional prior restraint. App. at 35a.

On that day, the district court orally ruled against the prolife clinic, issuing the preliminary injunction against the appellants. The court also denied the motions to dismiss. The judge ruled that the allegations that the prolife clinic had conducted false advertising were sufficient to justify the issuance of the preliminary injunction. The trial court ruled that there were sufficient allegations that appellants had infringed on appellees' trade name for their abortion clinic. The trial court wrote:

> Plaintiffs have submitted sufficient evidence to the Court for the Court to hold that Plaintiffs are entitled to a preliminary injunction pursuant to N.D.C.C. section § 32-06-02. Subsection 1 of N.D.C.C. section 32-06-02 states that when it shall appear by the complaint that the plaintiff is entitled to the relief demanded and such relief consists in restraining the commission or continuance of some act, the commission or continuance of which [during] litigation would produce injury to the plaintiff, then the preliminary injunction should be granted.

App. at 27a.

The trial judge, the Hon. John O. Garaas, issued an oral order from the bench, restraining the prolifers' counseling and advertising, on February 22, 1985. The judge issued a written order stating virtually the same things as the written order, together with "Findings of Fact"[3] and Conclusions of Law on March 1, 1985.

App. at 28a.

> THEREFORE, IT IS ORDERED, that the Plaintiffs' Motion for a Preliminary Injunction is granted.

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[3] Appellants argue that it is inaccurate to call the trial judge's document "Findings of Fact." The trial judge issued the preliminary injunction based solely on the sufficiency of the pleasings.

IT IS FURTHER ORDERED that the preliminary injunction will be valid during the time this action is pending until it is resolved.

IT IS FURTHER ORDERED that the defendant be enjoined from using the name Women's Help Clinic, or comparable words which are similar, and confusisng. The use of the name Women's Help Clinic, or comparable words which are similar, is to be stopped at this time to prevent further confusion.

IT IS FURTHER ORDERED that the defendants individually and collectively, jointly and severally, shall be prohibited from falsely and deceptively advertising that they provide elective abortions and financial assistance for such services.

IT IS FURTHER ORDERED that the defendants do not falsely lull people that come to them for counseling into thinking that they are, in fact, the Women's Health Organization or the Fargo Women's Health Organization, Inc., and that the defendants take no action or inaction which would lull people into believing that they are dealing with the Fargo Women's Health Organization, Inc., when they are in fact dealing with defendants or F-M Women's Help and Caring Connection, Inc.

IT IS FURTHER ORDERED that if the defendants advertising using the term abortion, then they must state that they do not perform abortions.[4]

IT IS FURTHER ORDERED that this Order is effective as of 4:45 p.m. on February 22, 1985.

IT IS FURTHER ORDERED that defendants individually and collectively make every reasonable

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[4] This paragraph of the trial court's order was struck by the North Dakota Supreme Court. That Court upheld all of the rest of the Trial court's order. See 381 N.W.2d at 179; App. at 5a.

effort to cancel or stop all further advertising in the manner prohibited by this order.

The prolife clinic appealed the issuance of the preliminary injunction and the denial of the motions to dismiss to the North Dakota Supreme Court on March 27, 1985, App. at 23a. In their brief to the North Dakota Supreme Court, the prolife clinic argued that the injunction was unconstitutional, because it treated their ads and counseling as commercial speech, and acted as a prior restraint. See 381 N.W.2d at 177, App. at 3a.

On January 7, 1986, the North Dakota Supreme Court issued an opinion in the appeal of the preliminary injunction. The North Dakota Supreme Court upheld all of the injunction, except the last part, which forbade the prolifers to use the word, "abortion," unless to say that they do not perform abortions. See footnote 4.

The North Dakota Supreme Court said the ads were commercial speech, not advocacy speech, and could be regulated under that more-lax constitutional standard. The court rejected arguments that the injunction operated as an unconstitutional prior restraining against the prolifers' constitutional rights of free speech and press. App. at 6a.[5]

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[5] Much more has occured in this lawsuit, but it is not presently on appeal to this Court. In March, private investigator Darrell Graf conducted a series of wiretaps against the prolife counseling clinic. The abortion clinic hired him to get actors to read scripts to the prolife clinic's telephone counselors. The goal of the wiretap was to see if the prolifers were violating the court order issued on February 22, 1985.

On March 27, 1985, the abortion clinic filed a motion for contempt. The abortion clinic filed tapes of the wiretaps and transcripts. On July 16, 1985, the District Court convened a hearing on the contempt

REASONS FOR HEARING THE APPEAL

I. THE CASE PRESENTS IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW NOT YET SETTLED BY THIS COURT.

This case presents the Court with the question whether a state false advertising law, intended to regulate commercial speech, can be constitutionally applied to noncommercial, advocacy speech. The continuing controversy in our nation on abortion has spilled over into the free speech realm, with prochoice people alleging in increasing numbers of cases that the ads of prolife coun-

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motion. The hearing resumed and ended on August 19, 1985.

Patricia Larson, one of the prolife appellants, testified at the hearing that they altered the Yellow Pages telephone directory advertisement for the clinic soon after the court order was issued on February 22, 1985, and that the new ad contained the corporate name (Women's Help and Caring Connection, Inc.), rather than the tradename (Women's Help Clinic). Mrs. Larson said that people continued to call based on the ad in the old edition of the Yellow Pages, and referred to the prolife clinic by the tradename. Mrs. Larson denied that she ever intended to mislead any caller into thinking that the prolife clinic performed abortions.

At the end of the August 19, 1985 hearing, the trial court found the prolifers in contempt of his court order. The judge based his findings on the contents of the wiretap transcripts, and also the new, post-injunction prolife ads. App. at 14a.

The trial court found the prolifers in contempt of court, and fined the corporation $500 and sentenced each of the corporation's directors to 30 days in jail. The trial judge expanded his order to say that the prolifers must affirmatively state in their advertisement that they do not perform abortions, and that they had two weeks to comply with the order. App. at 21a.

The prolifers appealed the finding of contempt to the North Dakota Supreme Court. That court heard oral arguments on March 4, 1986, but has not issued an opinion on the contempt at this time.

seling center are commercial speech, and can be regulated as "false advertising," See. e.g., *Mother and Unborn Baby Care of North Texas, Inc.* v. *Jane Doe, et al.*, 689 S.W.2d 336 (Tex.Ct.App. 1985). See also "Selling Chastity—The Sly New Attack On Your Sexual Freedom," *Vogue*, March, 1986., p. 482.

The dynamics of this public debate on abortion have caused many prolife people to form crisis pregnancy centers, out of their deeply-held religious, moral and ideological beliefs. The increased growth of these centers, and their public advertisments, present this Court with a new situation in American life: advertisments for free pregnancy counseling based on strong moral beliefs on a controversial subject.

The North Dakota Supreme Court did not agree with the representation of these ads as advocacy speech, and said the ads could be restricted by use of the false advertising laws. The North Dakota Supreme Court said:

> The Help clinic also asserts that its advertisment constitute advocacy of the prolife position and for that reason are not commercial speech. We disagree. The communications of the Help Clinic to which the preliminary injunction is directed advertise services in a commercial context without substantial reference to or comment upon matters of public issue. The only reference in the Help Clinic's advertisment not dealing directly with the solicitation of clientele to receive medical or advisory services is a single word, "pro-life" placed in some of the advertisments.

381 N.W.2d at 181, App. at 7a.

To treat such advertisments as mere commercial speech, as the North Dakota Supreme Court does, is to lower advocacy speech to the level of commercial speech,

in a way this Court warned against in *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447 (1978):

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech [advocacy speech].

436 U.S. at 456

Justices Stevens and Brennan echoed this concern in their concurrence in *Central Hudson Gas* v. *Public Service Commission of New York*, 447 U.S. 557 (1980):

> Because "commercial speech" is afforded less constitutional protection than other forms of speech, it is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed.

447 U.S. at 579

The North Dakota Supreme Court tried to avoid this problem by essentially misconstruing the nature of the case. The North Dakota Supreme Court said that a commercial entity cannot make its advertising "advocacy speech" by linking its product or service with a current public debate, when it is really mere commercial speech, and based that position on this Court's decision in *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 68 (1983). See 381 N.W.2d at 181, App. at 8a.

The situation in this case is the exact reverse. This is not the situation of a commercial entity trying to link a product it is selling to a substantive issue debate in the society. Instead, this is the situation in which a group of prolife advocates have set up a crisis pregnancy center

due to their beliefs and have advertised the available free pregnancy tests and counseling

To limit the prolifers' ads because they appear commercial on the surface, is to restrict the protected beliefs that motivate the prolifers to set up the clinic. The prolifers advertise their counseling because of what they believe is right, not because of what they want to sell. In fact, it is important to note that the prolife clinic "sells" nothing. It is totally a noncommercial enterprise. No person is ever charged anything for the prolife clinic's services.

The North Dakota Supreme Court allows the development of a novel and potentially pernicious constitutional doctrine that advocacy speech can be regulated if it appears in a commercial form. This line of reasoning has been refuted to some extent already by this Court, see *U.S.* v. *Ballard*, 322 U.S. 78 (1944) and *Bigelow* v. *Virginia*, 421 U.S. 809 (1975). This reasoning, if left unchecked, could have expansive applications that would curtail First Amendment freedoms.

The North Dakota Supreme Court said that nothing prevents the prolifers from presenting their anti-abortion view in a newspaper ad:

> To the extent that the Help Clinic is interested in advocating a social or political position on any issue it can do so outside the commercial context, and receive full First Amendment protection; hence, it is unnecessary to extend the full panoply of First Amendment protections to the clinic's commercial solicitation of clientele.

381 N.W.2d at 181, App. at 8a.

This concept misses an important aspect of the advertisement. The religious and moral convictions of the prolifers compel them to operate the clinic, and to advertise

for women with unwanted pregnancies who desire counseling from a prolife perspective. The North Dakota courts did not totally forbid prolife advertising, yet they have yet to find one of their ads acceptable under the false advertising laws.[6]

The prolife ads offered indecision counseling for women with unwanted pregnancies, with the counseling offered

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[6] This is the prolifers' ads which appeared in the *Fargo Forum* before the district court's preliminary injunction:

Contemplating Abortion?
Call Us First For Your Protection
- Confidential—we don't trace calls
- Financial assistance
- Free pregnancy test
- Indecision counseling—Pro-life
- Services performed by licensed physicians

701-232-2716
Answered 24 hours a day
CALL TOLL FREE
ND 1-800-732-2422
MN SD 1-800-362-3145

The *Fargo Forum* ad, which appeared after the issuance of the preliminary injunction, and which the trial judge ruled violated his injunction, read as follows:

PREGNANT AND DON'T WANT TO BE?
A women's clinic—women helping women
232-2716
Answered 24 hours
CLIP THIS AD for a FREE Pregnancy Test
Confidential
Financial Assistance
Services performed by licensed physicians
Call Toll Free
ND 1-800-732-2422
MN SD 1-800-362-3145
FM Women's Help and Caring Connection, Inc.
Pro-life

free of charge. This was not speech "proposing a commercial transaction, which occurs in an area traditionally subject to government regulation," *Ohralik, supra,* at 455-56. This is speech offering a free public service based on the religious and moral convictions of the prolife counselors.

The prolife clinic's ads contained the word, "prolife" in them, yet the North Dakota courts found them to violate the false advertising laws. The First Amendment has not been construed by this Court to require that counselors or other advocates must disclose all of their background philosophy and ideology in any public advertisment. Such a requirement would have a chilling effect on free speech pronouncements. This Court should note probable jurisdiction to define more precisely this area of constitutional law, so that false advertising laws do not become a new weapon against free speech rights.

II. THE DECISION BELOW IS IN CONFLICT WITH APPLICABLE PRINCIPLES OF CONSTITUTIONAL LAW ESTABLISHED BY THIS COURT

A. The North Dakota Courts Issued A Preliminary Injunction That Acts As A Prior Restraint, Without Proper Constitutional Safeguards.

The North Dakota district court issued a preliminary injunction against the prolife counselors' advertising and counseling, based solely on the sufficiency of the pleadings. The North Dakota courts did not grant the full amount of protection required by this Court in prior restraint cases, even though the North Dakota Supreme Court said the procedural safeguards passed constitutional muster.

The trial judge issued his preliminary injunction based solely on the sufficiency of the allegations. The judge wrote in his written order:

> Plaintiffs have submitted sufficient evidence to the Court for the Court to hold that plaintiffs are entitled to a preliminary injunction pursuant to N.D.C.C. section 32-06-02. Subsection 1 of N.D.C.C. section 32-06-02 states that when it shall appear by the complaint that the plaintiff is entitled to the relief demanded and such relief consists in restraining the commission or continuance of some act, the commission or continuance of which litigation would produce injury to the plaintiff, then the preliminary injunction should be granted.

— App. at 27a.

The trial judge based his injunction on North Dakota Century Code 32-06-02, which states:

> An injunction may be granted in any of the following cases:
>
> 1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the plaintiff.

It is clear that the district court believed that the standard for assessment of the evidence was N.D. Cent. Code 32-06-02. Any doubt concerning this proposition is erased when the district court's comments upon its oral ruling are considered:

> The Court is of the opinion that all—that there is sufficient evidence in the form of affidavits and it appears to this Court from the Complaint and all of the supporting documents that the Plaintiff is entitled to the relief demanded pursuant to 32-06-02 of the North Dakota Century Code.
>
> Subsection one of that statute states that when it shall appear by the Complaint that the Plaintiff is

> entitled to the relief demanded or continuance of some act, the commission or continuance of which during litigation would produce injury to the Plaintiff, then the preliminary injunction should be granted.

—Feb. 22, 1985 hearing, at 82

The district court's review of the "evidence" in making its oral opinion is often couched in terms of the sufficiency of the allegations. For example, the district court said:

> The Court also finds from the affidavits and supporting documents that these advertisements are given, *or it appears that they are*, that the offer of service of an advertisement which contains assertions, representations or statements of fact which are untrue, deceptive and misleading.
>
> The Court further believes that the Defendants, as individuals and as a corporation have, *it appears they have*, violated Section 51-12-01 and also 51-12-08 in conducting false advertising.

—Tr. at 83.

Courts cannot make true "Findings of Fact" on appearances, especially when dealing with constitutionally-protected speech. Thus the following "Findings of Fact" cannot be construed as Findings, rather they must be considered to be nothing more than allegations which have been deemed sufficient under N.D. Cent. Code 32-06-02.

The North Dakota Supreme Court upheld the constitutional adequacy of the lower court's actions, but that Court made the standard for issuing injunctions against protected speech sound higher than it really is, and was, in this case. The Court said:

> We agree that Women's Health made a sufficient showing at this preliminary stage of the proceedings, with adequate allegations and supporting affidavits, *to show probable success on the merits* so as to justify the imposition of the preliminary injunction. Accordingly, we conclude that the trial court did not abuse its discretion in granting the preliminary injunction (emphasis added).

—381 N.W.2d at 179, App. at 5a.

The prolife clinic would have had greater constitutional protection if the trial judge required the abortion clinic to prove "probable success on the merits," before issuing the injunction. The trial judge used the "sufficiency of the allegations" standard, which is the standard of the appropriate statute, and also is the standard used by the North Dakota Supreme Court.

It is clear from the transcript that the judge *did not* find that the abortion clinic was likely to prevail on the merits of its lawsuit:

Prolifers' Attorney: . . . And plaintiff, in order to be entitled to relief, have to be able to show they will prevail on the merits.

Court: Has there been a case in North Dakota that says that in black and white?

Prolifers' Attorney: The closest we could come is *State ex rel. Holloway* v. *First American Bank.*

Court: Of course a restraining order could never be issued unless the Complaint itself had some validity and stated a cause of action. But North Dakota has never taken that position, even though various circuits of the Federal Court have taken the position. I was upheld by the Supreme Court in a recent case which has not yet been published. And it's entitled *Advanced Business Tele-*

phones, Inc., v. *Professional Data Processing, Inc.* and others . . . I did not in making that ruling find that in the even that the case is tried on the merits, that possibly the plaintiff would prevail. I don't think I did anyway. And the issue was never brought up . . . But they [the North Dakota Supreme Court] simply said that the trial court in its discretion is guided by Section 32-06-02 of the North Dakota Century Code, which provides that an injunction may be granted—we're speaking here of a preliminary injunction—when it shall appear by Complaint that the plaintiff is entitled to the relief demanded. And nowhere did the Supreme Court in that case enter into the issue of whether there is a requirement that the Court must make a finding that in the Court's opinion the merits in the final determination of the case the movant in a motion for a Temporary Restraining Order is likely to prevail. Actually putting the Court into that kind of a situation makes the Court a—have to have a crystal ball to decide that. So the Supreme Court has not directly applied that standard.

—Tr. at 20-21

The North Dakota Supreme Court has stated that preliminary injunctions may be issued without a showing of "probable success on the merits." In *Gunsch* v. *Gunsch*, 69 N.W.2d 739 (1955), the North Dakota Supreme Court quoted with approval the following standard:

> It is not necessary that the complaintant's rights be clearly established, or that the court find complainant is entitled to prevail on the final hearing. It is sufficient if it appears that there is a real and substantial question between the parties, proper to be investigated in a court of equity, and in order to prevent irremedial injury to the complainant, before his claims can be investigated, it is necessary to prohibit any change in the conditions and relations of the

> property and of the parties during the litigation (citations omitted).

—69 N.W.2d at 750

This standard may be fine for many different types of situations, but it fails constitutionally to protect free speech rights. As applied, this standard allows restraints against the prolifers' protected speech.

Both the trial judge and the statute follow this standard. The North Dakota Supreme Court stated a different, higher standard, and made it sound as if this standard was the one used by the trial court. The North Dakota Supreme Court "scotch taped" a higher standard onto the injunction, although the trial court did not use it, the statute does not require it, and the state Supreme Court's own case law does not demand it.

The North Dakota Supreme Court went on to say that the preliminary injunction hearing sufficiently protected the prolife clinic's constitutional rights, and that further procedural protection was unnecessary:

> Although there may be instances where free speech issues are raised that the providing of an evidentiary hearing would be a necessary prerequisite to imposing a temporary restraint, in this case the trial court's failure to hold an evidentiary hearing did not, in our opinion, offend the First Amendment rights of the Help Clinic. The process utilized by the trial court was adequate to protect the parties' interests.

—381 N.W.2d at 182, ftnote 4, App. at 11.

The trial judge issued his injunction without an evidentiary hearing, without an opportunity to cross-examine witness and with no opportunity to ascertain whether the affiants Jane Doe I, II, III and IV were real or fictitious. The judge used the meager amount of evidence before him

to issue a preliminary injunction to restrain the prolifers' advertisements and counseling.

Such "prior restraints" run afoul of constitutional standards established by this Court to protect free speech and press. In *Pittsburgh Press Co.* v. *Human Relations Commission*, 413 U.S. 376, (1973), the Supreme Court repeated its opposition to prior restraints:

> The special vice of prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, *before an adequate determination that it is unprotected by the First Amendment.* (Emphasis added).

413 U.S. at 390.

This is precisely the "vice" which has happened in this case. There has been no determination, especially of the kind the Supreme Court demands, that the advertisment of the prolife clinic are unconstitutional.

In *Southeastern Promotions Ltd.* v. *Conrad*, 420 U.S. 546, (1975), the Supreme Court laid out three criteria for imposition of a prior restraint, even against unprotected speech.

> A system of prior restraints runs afoul of the First Amendment if it lacks certain safeguards: *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured.

420 U.S. at 560.

The trial court's prior restraint against the prolife clinic does not comply with these three criteria. It was not

proven that the prolife advertisment or counseling activities are unprotected speech. In fact, the abortion clinic was not required to *prove* anything. They have simply been required to make allegations which the trial court found to be sufficient. This practice is unconstitutional whether the speech is commercial or noncommercial.

The preliminary injunction was not placed on the prolifers for a specified brief period of time, merely to preserve the status quo. The injunction here, in essence, has shifted the status quo and gives the abortion clinic a victory on the merits. The prolife clinic has been required to change its ads and counseling pendente lite. Also, the trial court issued the preliminary injunction on February 22, 1985, and no prompt final judicial determination of the merits appears on the horizon, over one year later.

Thus N.D. Cent. Code § 32-06-02, which permits preliminary injunctions solely on the sufficiency of the allegations, is unconstitutional when it is applied so as to curtail protected speech. Any curtailment of speech of any kind—protected or unprotected—is an unconstitutional prior restraint unless there has been a factual determination, which includes a hearing, with opportunity for cross-examination and the right to present rebuttal witnesses. And at that hearing the standard of proof required cannot be the sufficiency of the allegations, but the same standard that is required in order to ultimately prevail on the merits.

The failure of the North Dakota courts to adhere to this Court's requirements for a prior restraint on speech has already resulted in demonstratable harm to the exercise of the prolife clinic's free speech rights. The district court found the appellants in contempt of court for violating the

preliminary injunction. The appellants were sentenced to jail and had a fine levied on them.

The prolifers should not be made to suffer loss of their constitutional rights, as they await the outcome of the abortion clinic's suit. No person or group should suffer loss of their constitutional rights as they await the outcome of a hearing. The preliminary injunction should be vacated on the fact alone that the prolifers have had their rights encroached by an inadequate judicial hearing.

B. The North Dakota Court Failed To Treat Advertisment Dealing With Abortion As Advocacy Speech, Rather Than Less-Protected Commercial Speech.

The Supreme Court has clearly stated that commercial advertisments concerning abortion are not "second class" commercial speech, but protected advocacy speech under the First Amendment. The U.S. Supreme court struck down a Virginia law that prohibited abortion advertising. In *Bigelow* v. *Virginia*, 421 U.S. 809 (1975), this Court said:

> Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia. . . . Also, the activity advertised pertained to constitutional interests, *Roe* v. *Wade*, *Doe* v. *Bolton*, (citations omitted). Thus, in this case, appellant's First Amendment interests coincided with the constitutional interests of the general public.

421 U.S. at 822.

The prolife clinic's ads in this case deal with abortion counseling, although they obviously take the opposite

position of the pro-abortion ad in *Bigelow.* But the constitutional principle remains the same. The Minnesota federal district court, when ruling against a state law that barred abortion advertising, said in *Meadowbrook Women's Clinic* v. *State of Minnesota*, 557 F.Supp. 1172 (D.Minn. 1983):

> The proposed advertisement contains information about lawful services the (abortion clinic) provides. The activity advertised pertains to constitutional interests.

557 F.Supp. at 1177.

Ironically, the very abortion clinic which is the plaintiff and appellee in this suit and is suing to restrict advertisment about prolife abortion counseling; brought an earlier case where it argued that abortion advertisements were protected speech, and could not be regulated by the state. See *Leigh* v. *Olson*, 497 F.Supp. 1340 (D.N.D.S.E. Div. 1980). Language from that federal district court decision is instructive for the case now before the Court. In that case, the court said that abortion advertising cannot be threatened with criminal sanctions by the state:

> The question of whether the statute violates the First Amendment need not be addressed but the court notes that the threat of criminal sanctions for communications having as their purpose inviting, inducing or attracting a pregnant woman to undergo an abortion would effectively deter the exercise of free speech. (Citation omitted).

497 F.Supp at 1350

The words quoted above apply to the case at hand. Appellants are threatened with criminal sanctions if they communicate wrongly about their views on abortion, even though this Court has said that advertisements con-

cerning abortion pertain to constitutional interests, *Bigelow, supra*. The state courts should not be allowed to construe the advertisements as "commercial speech," and to levy injunctions against them.

CONCLUSION

This case presents a new threat to freedom of speech and press. The abortion clinic is using the weapon of false advertising laws to get state court restrictions on the prolifers' advocacy speech. Courts should not be able to evade constitutional protections on speech by definitional maneuvers. For all of the foregoing reasons, this Court should note probable jurisdiction.

Respectfully submitted,

MICHAEL P. FARRIS
Counsel of Record for Appellants

JORDAN W. LORENCE
Staff Attorney

April 7, 1986

APPENDIX

APPENDIX

In The Supreme Court
STATE OF NORTH DAKOTA

Civil No. 10,946

FARGO WOMEN'S HEALTH ORGANIZATION, INC., ROBERT LUCY, M.D., GEORGE KIKS, M.D., & JANE DOE,
Plaintiffs and Appellees,

v.

PATRICIA LARSON, DARROLD LARSON, DAVID PENCE, TERRI CARLSON, JOHN ROBERTSON, ROBYN ROBERTSON, LORALEE ISAACSON, DIRECTORS OF THE FM WOMEN'S HELP AND CARING CONNECTION d/b/a WOMEN'S HELP CLINIC,
Defendants and Appellants.

FILED JAN. 7, 1986
CLERK, SUPREME COURT

Appeal from the District Court of Cass County, East Central Judicial District, the Honorable John O. Garaas, Judge.

AFFIRMED IN MAJOR PART AND MODIFIED.

Opinion of the Court by Gierke, Justice.

William Kirschner, 17 South 8th Street, Fargo, ND 58103, for plaintiffs and appellees.

Jean Samelson, Box 7488, Fargo, ND 58108, Michael P. Farris, General Legal Counsel, and Jordan W. Lorence, Staff Counsel, Concerned Women for American Education and Legal Defense Foundation, 122 C Street Northwest, Suite 800, Washington, DC 20001, for defendants and appellants; argued by Michael P. Farris and Jean Samelson.

Fargo Women's Health Organization, Inc. v. *Larson*

Civil No. 10,946

GIERKE, Justice.

The defendants (the Help Clinic) appeal from an order of the district court imposing a preliminary injunction against their use of false and deceptive advertising and related activity pending a final determination in this case. We modify the order and, as modified, affirm.

Following its entry of the preliminary injunction, the trial court entered an order finding the Help Clinic in contempt of court for violating the preliminary injunction. We issued a temporary stay of the contempt order pending this appeal, and we now vacate that temporary stay.

The plaintiffs (Women's Health) operate a medical clinic in Fargo which performs abortions. The Help Clinic, also operating in Fargo, provides pregnancy tests and anti-abortion counseling services but does not perform abortions. During January 1985, Women's Helath filed an action for damages and injunctive relief asserting that the Help Clinic, through false and deceptive advertising and related activity, misleads persons into believing that abortions are conducted at the clinic with the intent of deceptively luring those persons to the clinic to unwittingly receive anti-abortion propaganda. Women's Health also asserts that the Help Clinic uses the similar name "Women's Help Clinic" to intentionally confuse women seeking abortions from Women's Health and to cause them to mistakenly contact the Help Clinic.

Upon filing the action, Women's Health requested the trial court to enter a preliminary injunction to enjoin all deceptive advertising and related solicitation practices by the Help Clinic during the pendency of this action. Following a non-evidentiary hearing, the district court entered an order granting the preliminary injunction from which the Health Clinic has now filed this appeal.

On its appeal, the Help Clinic has raised the following issues:

(1) Whether the trial court abused its discretion in granting a preliminary injunction under Section 32-06-02(1), N.D.C.C.;

(2) Whether the trial court's imposition of a preliminary injunction unconstitutionally infringed upon the Help Clinic's First Amendment rights against prior restraint;

(3) Whether the North Dakota false advertising law, Chapter 51-12, N.D.C.C., is applicable to advertisements of the Help Clinic, and, if so, whether the law violates the Help Clinic's rights of free speech under the First Amendment;

Whether Women's Health has a cause of action for trade-name infringement under the circumstances of this case; and

(5) Whether the trial court should have dismissed the second cause of action for damages brought by Women's Health because that action is filed on behalf of an unknown, unnamed fictitious person.

Pursuant to Section 32-06-02(1), N.D.C.C., the court may enjoin conduct which, if not restrained, would produce injury to the plaintiff "when it shall appear by the complaint that the plaintiff is entitled to the relief demanded." On appeal, this Court will not set aside an order granting a preliminary injunction unless the trial court abused its discretion in entering the order. *Advanced Business Telephones, Inc.* v. *Professional Data Processing, Inc.*, 359 N.W.2d 365 (N.D. 1984).

The trial court's order imposing a preliminary injunction provided in relevant part:

"THEREFORE IT IS ORDERED, . . that the defendant be enjoined from using the name Women's Help Clinic, or comparable words which are similar, and confusing . . .

". . . [T]hat the defendants individually and collectively, jointly and severally, shall be prohibited from falsely and deceptively advertising that they provide elective abortions and financial assistance for such services.

". . . [T]hat the defendants do not falsely lull people that come to them for counseling into thinking that they are, in

fact, the Women's Health Organization or the Fargo Women's Health Organization, Inc. and that the defendants take no action or inaction which would lull people into believing that they are dealing with the Fargo Women's Health Organization, Inc. when they are in fact dealing with defendants or F-M Women's Help and Caring Connection, Inc. . . .

". . . [T]hat if the defendants advertise using the term abortion, then they must state that they do not perform abortions."

In determining whether or not the trial court abused its discretion in granting the preliminary injunction, we are bound by the facts as presented to the trial court. *See Edgeley Education Association* v. *Edgeley Public School, Etc.*, 231 N.W.2d 826 (N.D. 1975). In reaching its decision, the trial court considered affidavits filed by the parties and argument presented by counsel for the parties. In addition, the trial court had before it the Help Clinic's newspaper and telephone book yellow page advertisements.[1]

Prior to granting the preliminary injunction, the trial court determined that Women's Health had made a prima facie show-

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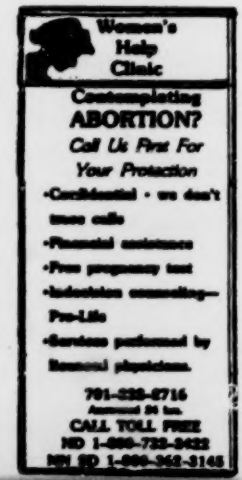
[1] Copies of typical advertisements sponsored by the Help Clinic are reproduced here:



BEST AVAILABLE COPY

ing that the Help Clinic was sponsoring false and deceptive advertising which, if allowed to continue during the litigation would result in injury to Women's Health. We agree that Women's Health made a sufficient showing at this preliminary stage of the proceedings, with adequate allegations and supporting affidavits, to show probable success on the merits so as to justify the imposition of the preliminary injunction. Accordingly, we conclude that the trial court did not abuse its discretion in granting the preliminary injunction.[2]

With one exception, the trial court's order was narrowly drawn, focusing only upon the prohibition of deceptive or misleading activity by the Help Clinic during the pendency of the action. However, we believe that the last part of the order which requires the Help Clinic, if it uses the term abortion in its advertisements, to state that it does not perform abortions is redundant and an unduly broad restriction, the imposition of which constituted an abuse of discretion by the trial court. Other provisions of the trial court's order adequately prohibit the Help Clinic from "falsely and deceptively advertising that they provide elective abortions." Consequently, the additional requirment in the court's order that the Help Clinic affirmatively state that it does not perform abortions is merely redundant and unnecessary to accomplish the objective of preventing false and deceptive activity. Accordingly, we hold that the order should be modified by striking the following:

> "IT IS FURTHER ORDERED that if the defendants advertise using the term abortion then they must state that they do not perform abortions."

The Help Clinic also asserts that the preliminary injunction[3]

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[2] This determination on the preliminary injunction is in no way meant to be an expression of the outcome of subsequent proceedings on the merits or of the appropriateness or breadth of permanent injunctive relief.

[3] In deciding this constitutional issue, we are reviewing the trial court's order as modified by this Court in this opinion.

constitutes an unconstitutional prior restraint in violation of the First Amendment.

Any system of prior restraint on speech bears a heavy presumption against its constitutional validity. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). The United States Supreme Court has described the conflict between prior restraint and First Amendment free speech guarantees:

> "The special vice of a prior restraint is that communication will be supressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376, 93 S.Ct. 2553, 2561, 37 L.Ed.2d 669, *reh'g denied*, 414 U.S. 881, 94 S.Ct. 30, 38 L.Ed.2d 128 (1973).

However, commercial speech does not receive the full panoply of protection under the First Amendment as do other forms of protected speech. *Zauderer* v. *Office of Disciplinary Counsel*, 105 S.Ct. 2265 (1985); *Central Hudson Gas* v. *Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). Although the extent to which the prior retraint doctrine applies to commercial speech has not been fully delineated, it is quite clear that prior restraint on commercial speech is allowed to an extent which would not be allowed toward other forms of protected speech. *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). See also *Kleiner* v. *First National Bank of Atlanta*, 751 F.2d 1193 (11th Cir. 1985); *United States Postal Service* v. *Athena Products*, 654 F.2d 362 (5th Cir. 1981), *cert. denied*, 456 U.S. 915, 102 S.Ct. 1768, 72 L.Ed.2d 173 (1982). Therefore, in determining whether the trial court's preliminary injunction constituted an unconstitutional prior restraint, it is necessary to determine whether the Help Clinic's communication constituted commercial or non-commercial speech and then to determine whether the trial court afforded appropriate safeguards in imposing the preliminary injunction commensurate with the type of speech involved.

In *Zauderer, supra,* at 2274-75, the United States Supreme Court stated:

> "There is no longer any room to doubt that what has come to be known as 'commercial speech' is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded 'noncommercial speech.' More subject to doubt, perhaps, are the precise bounds of the category of expression that may be termed commercial speech, but it is clear enough that the speech at issue in this case—advertising pure and simple—falls within those bounds. Our commercial speech doctrine rests heavily on 'the "common-sense" distinction between speech proposing a commercial transaction. . . and other varieties of speech,' . . ." [Citations omitted.]

The Help Clinic asserts that its communication is not commercial speech because no financial charges are assessed against persons receiving services from the clinic. On the record before us, it is not clear to what extent, if any, monies are exchanged between the Help Clinic and its clientele. However, the Help Clinc advertisements expressly state that financial assistance is available and that major credit cards are accepted. Through one of its affidavits, Women's Health asserts that in at least one instance a person who responded to the advertisements was referred to a physician by the Help Clinic and was charged for the counseling services rendered by the physician. Irrespective of the degree, if any, that monies are received by the Help Clinic from its clients we do not believe that factor is dispositive of our determination that the communication involved is commercial speech. More importantly, the Help Clinic's advertisements are placed in a commercial context and are directed at the providing of services rather than toward an exchange of ideas. The Help Clinic advertisements offer medical and advisory services in addition to financial assistance. In effect, the Help Clinic's advertisements constitute promotional advertising of services through which partronage of the clinic is solicited, and in that respect constitute classic examples of commercial speech.

The Help Clinic also asserts that its advertisements constitute advocacy of the pro-life position and for that reason are not commercial speech. We disagree. The communications of the Help Clinic to which the preliminary injunction is directed

advertise services in a commercial context without substantial reference to or comment upon matters of public issue. The only reference in the Help Clinic's advertisements not dealing directly with the solicitation of clientele to receive medical or advisory services is the single word "pro-life" placed in some of the advertisements.

It is well settled that advertisers cannot, by merely including references to public issues or public debate, thereby take their advertisements out of commercial speech and into the area of fully protected speech. *Zauderer, supra; Bolger* v. *Youngs Drug Products Corporation*, 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983); *Central Hudson Gas* v. *Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). The rationale of the Supreme Court in this regard is equally clear:

> ". . . [A]dvertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech. A company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions. Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." [Citations omitted; Footnote omitted.] 103 S.Ct. at 2881.

To the extent that the Help Clinic is interested in advocating a social or political position on any issue it can do so outside the commercial context and receive full First Amendment protection; hence, it is unnecessary to extend the full panoply of First Amendment protections to the clinic's commercial solicitation of clientele.

This case is readily distinguisable from the case of *Bigelow* v. *Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975), which involved a Virginia statute making it unlawful to publish any statement which encouraged the procuring of an abortion. The publisher of a Virginia newspaper was convicted for violating the statute by printing an advertisment for an organization which assisted in placing persons in accredited New York hos-

pitals and clinics for purposes of obtaining abortions. The United States Supreme Court, in holding that the statute violated the publisher's First Amendment rights, concluded:

> "The adverstisment published in appellant's newspaper did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.' Portions of its message, most prominently the lines, 'Abortions are now legal in New York. There are no residency requirments,' involve the exercise of the freedom of communicating information and disseminating opinion.
>
> * * * * *
>
> "We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit.
>
> * * * * *
>
> "Here, Virginia is really asserting an interest in regulating what Virginians may *hear* or *read* about the New York services. It is, in effect, advancing an interest in shielding its citizens from information about activities outside Virginia's borders, activities that Virginia's police powers do not reach. This asserted interest, even if understandable, was entitled to little, if any, weight under the circumstances.
>
> "No claim has been made, nor could any be supported on this record, that the advertisement was deceptive or fraudulent, or that it related to a commodity or service that was then illegal . . ." [Footnotes omitted.] 95 S.Ct. at 2232-2236.

This case, unlike the fact situation in *Bigelow*, does not involve the prohibition or restriction of factual material or public interest apart from the mere commercial solicitation of clientele. This case is also substantively distinguishable from *Bigelow, supra*, because it involves a narrowly prescribed order temporarily restraining allegedly false and deceptive communication whereas *Bigelow, supra*, involved a broadly drawn statute prohibiting the dissemination of concedely accurate factual information on the basis of content.

We conclude that the communication at issue in this case is commercial speech. Accordingly, the constitutional validity of the preliminary injunction must be judged under a relaxed standard of scrutiny appropriate to commercial speech. *See Kleiner* v. *First National Bank of Atlanta*, 751 F.2d 1193 (11th Cir. 1985); *United States Postal Service* v. *Athena Products*, 654 F.2d 362 (5th Cir. 1981), *cert. denied*, 456 U.S. 915, 102 S.Ct. 1768, 72 L.Ed.2d (1982).

In its order notifying the parties of the time and place for hearing, the trial court stated that, although it would accept affidavits and oral arguments by the parties, no live testimony or depositions would be considered. The Help Clinic did not object to that order nor did it request the court to permit testimony or to accept other forms of evidence. Nevertheless, the Help Clinic now asserts that the trial court infringed its First Amendment rights against prior restraint by imposing the preliminary injunction without benefit of an evidentiary hearing.

Prior to imposing the preliminary injunction the trial court considered the relief sought, the conflicting rights and interests of the parties involved, and the potential injury to the parties if the temporary injunctive relief was granted or denied. The trial court's order imposing a preliminary injunction was narrowly drawn so as to proscribe during the pendency of the action only deceptive and misleading activity. The court's order does not proscribe or restrict the Help Clinic from delivering services or from advertising its services so long as those activities are conducted in a nondeceptive manner.

There can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity or are more likely to deceive the public than to inform it. *Central Hudson Gas, supra; Friedman* v. *Rogers*, 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100, *reh'g denied*, 441 U.S. 917, 99 S.Ct. 2018, 60 L.Ed.2d 389 (1979). Given the commercial nature of the communication involved, the hearing

afforded to the parties,[4] the trial court's consideration of the parties' varying interests, and the narrowness with which the order was drawn, we conclude that the temporary injunctive relief granted to Women's Health does not unconstitutionally infringe the Help Clinic's First Amendment rights.

The Help Clinic has raised the issue of whether North Dakota's false advertising statute, Chapter 51-12, N.D.C.C., is applicable to this case and has also raised the issue of whether Women's Health has a cause of action for tradename infringement. An opinion by us at this time on those issues which involve the merits of the case would be advisory only. In reviewing the propriety of a preliminary injunction, it is inappropriate for this Court to resolve merit issues on the principal action. *Advanced Business Telephones, Inc.* v. *Professional Data Processing, Inc.*, 359 N.W.2d 365 (N.D. 1984). We have examined the matters involved in those issues only to the extent necessary for our determination that the trial court, on the record before it, did not abuse its discretion in imposing the preliminary injunction. We decline to examine or discuss those issues to any further extent at this time.

The Help Clinic has also raised the issue of whether the trial court should have dismissed the second cause of action brought by Women's Health because that action was filed on behalf of an "unknown, unnamed fictitious person." The trial court stated that it would take the motion for dismissal under consideration and rule on it prior to a trial on the merits. Because the trial court has not entered a ruling on that motion, it is inappropriate for us to consider that issue on this appeal.

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[4] Although there may be instances where free speech issues are raised that the providing of an evidentiary hearing would be a necessary prerequisite to imposing a temporary restraint, in this case the trial court's failure to hold an evidentiary hearing did not, in our opinion, offend the First Amendment rights of the Help Clinic. The process utilized by the trial court was adequate to protect the parties' interests.

In accordance with this opinion, we affirm the order imposing a preliminary injunction, and we vacate our stay of the contempt order.

/s/_____

/s/_____

/s/_____

/s/_____

Civil No. 10,946

FARGO WOMEN'S HEALTH ORGANIZATION* v. *LARSON

VandeWalle, Justice, concurring specially.

I am far from convinced that the provision enjoining the defendants from using the name Women's Help Clinic or "comparable words which are similar, and confusing . . ." is narrowly drawn. Rather, the provision pertaining to comparable words which are similar and confusing may be a very subjective standard, particularly in view of the evidence in the record that the Women's Health Organization used a variety of names in its own business, not all of which would be protected tradenames.

/s/GERALD W. VANDEWALLE

IN DISTRICT COURT, COUNTY OF CASS,
STATE OF NORTH DAKOTA

Civil No. 85-6

FARGO WOMEN'S HEALTH ORGANIZATION, INC., ROBERT LUCY, M.D., GEORGE MIKS, M.D., & JANE DOE,
Plaintiffs,

v.

PATRICIA LARSON, DARROLD LARSON, DAVID PENCE, TERRI CARLSON, JOHN ROBERTSON, ROBYN ROBERTSON, LORALEE ISAACSON, DIRECTORS OF THE FM WOMEN'S HELP AND CARING CONNECTION d/b/a WOMEN'S HELP CLINIC,
Defendants.

FINDINGS OF FACT AND ORDER ON CONTEMPT

A hearing was held before John O. Garaas, District Judge, at Fargo, North Dakota, on August 19, 1985, on the issue of whether the Defendants were in civil contempt of Court. The Plaintiffs were represented by William Kirschner and Al Baker of Fargo, North Dakota. The Defendants were represented by Michael P. Farris of Washington, DC.

Confusion has existed in past proceedings before this Court as to who the Defendants are. At the time of the commencement of this action, there was some doubt as to the status of the corporation. By stipulation in the open court records by all parties, the action is deemed to be against Patricia Larson, Darrold Larson, David Pence, Terri Carlson, John Robertson, Robyn Robertson, and Loralee Isaacson, as individuals, and who were then acting on the Board of Directors of the corporation. The remaining Defendant is the corporation known as FM Women's Help and Caring Connection, a corporation.

This Court after a hearing issued its written Order granting a Preliminary Injunction which would be effective during the

pendency of this action until its final resolution. (Clerk file No. 41). This Order enjoined the Defendants from using the name "Women's Help Clinic" in that the words are confused with the Plaintiffs' prior use of "Women's Health Clinic." The Order also restrained the the practice of deceptive advertising by the Defendants.

The burden of proof is on the Plaintiffs to show that the Defendants are guilty of civil contempt for violating such Order. In order to find them guilty, their actions and conduct must be with willful and inexcusable intent. *Bergstrom* v. *Bergstrom*, 320 NW2d 119 (ND 1982). In civil contempt proceedings, the offense must be clearly shown to have been committed. *Buchmann* v. *Buchmann*, 202 NW2d 677 (ND 1972).

In the Findings of Fact upon which the Preliminary Injunction was based, the Defendant consistently and in a calculated course of conduct conducted its advertising and interviewing of pregnant women to make them believe that they performed abortions. The Defendants admittedly do not perform abortions. This tactic was calculated to lull the pregnant women into believing that the pregnant women were dealing with the Plaintiff, Fargo Women's Health Organization doing business as Women's Health Clinic.

Since the Preliminary Injunction which was effective on February 22, 1985, the Defendants have willfully violated such Preliminary Injunction and proof has been made to this Court with clear and convincing evidence.

The evidence consists of various advertisements in the newspapers, an interview by Defendants given by a live witness, and tapes and transcriptions of various people contacting the Defendants by telephone.

The one advertisement (Exhibit 3) is in violation of the Preliminary Injunction and also in violation of Sections 51-12-01 and 51-12-08 of the North Dakota Century Code. Violation of Section 51-12-08 NDCC can be the basis for injunctive relief pursuant to 51-12-14 NDCC.

The advertisement had in large print "PREGNANT AND DON'T WANT TO BE?" A reasonable inference from such title would be that the Defendants performed abortions.

This same advertisement stated "Services performed by licensed physicians." The Defendants had no doctors on their staff. The entire service performed by the Defendants was counseling against abortions, and no physicians were employed. The recitation of this in the advertisement gives a reasonable inference and direct inference that the Defendants performed abortions with licensed physicians. While the argument could be that the service of the doctors was related to the free pregnancy testing, the two are not put together in proper context in the advertisement. This Court was never given any evidence that any physician ever gave a test for pregnancy. The advertisement is further confusing and deceptive in that no charge for counseling services was ever made or intended, yet the advertisement provided for "Financial Assistance." Furthermore, the organization never gave any financial assistance to anyone seeking counseling or an abortion.

Another advertisement is found in Exhibit 1. The telephone number to call in the advertisement is that of the Defendants. The advertisement is per se deceptive advertisement in that it states "No matter what your decision, we can help." This is false in that the Defendants give only counseling and no abortions. Neither will the Defendants refer a pregnant woman to an abortion clinic, this being contrary to the advertisement that states "Referrals." Again the advertisement leaves a direct inference that they perform abortions in stating "Licensed physicians," when in fact no doctors are on the staff and no doctors perform the counseling service. "Financial service" is promised when in fact none is available.

When Defendants Patricia Larson and Darrold Larson were asked what their participation was in placing the advertisement (Exhibit 1), each of them on advice of counsel refused to answer on the grounds that the answer might incriminate them. The corporation itself is not protected by the Fifth

Amendment right to remain silent. *United States* v. *White*, 322 US 694, 64 S.Ct. 1248, 88 L.Ed. 1542. The individual Defendants however are protected, even though this is a civil case. Their failure to testify creates an "adverse inference" that they caused the advertisement to be published. See *Parker* v. *Hennepin County District Court*, 285 NW2d 81 (MN 1979) and *Baxter* v. *Palmigiano*, 425 US 308, 96 S.Ct. 1551, 47 L.Ed. 810 (1976).

In that North Dakota, as far as known to this Court, has not yet ruled on this legal concept, this Court finds that the Defendants violated the Preliminary Injunction without the need for evidence of Defendants' participation through the use of "adverse inference." The telephone number itself established the advertisement to be that of the Defendant corporation. The Defendants did not introduce any evidence that they disclaimed the advertisement after proof that they knew about the advertisement.

Susan Roe, given anonymity by this Court, gave testimony that clearly established that the above two advertisements were misleading and deceptive. This Court finds as a fact that the Defendants affirmatively stated to her by telephone that they performed abortions. The Defendants also told her that they were the Women's *Health* Clinic. The Defendants without solicitation from Susan Roe quoted the price for such abortion procedure giving the assurance that they performed abortions. The actual personal interview later also confirmed that their advertisement was deceptive in that the Defendants admitted that they performed no abortions when specifically confronted on that point by Susan Roe. Susan Roe was lied to, and she was correct when she told the Defendant that she did not like to be lied to.

After the Preliminary Injunction, the Defendants were called by telephone by numerous actors pretending that they wanted an abortion. Each of these calls clearly shows the willful intent to deceive the originators of the calls. Such deception is outlined below. It suffices to say that the entire testi-

mony corroborated the deceptive advertising which was that the Defendants gave abortions and other services when in fact they did not. These violations of the Preliminary Injunction are as follows among others from Exhibit 2:

Page 1, ". . . this is Women's Help Clinic," which is confusing with "Womens Health Clinic."

Page 1, "We don't um make the appointments here, we don't perform the abortion right here." This leaves the reference that they perform abortions but not in the particular place where the telephone call was received. The Defendants never affirmatively came out and said they performed no abortions.

Page 1, reciting that the abortions were done between the 8th and 12th week leaves the originator of the call with the impression that they perform abortions.

Page 1, reciting the actual cost of abortions leaves the inference that they perform abortions.

Page 2, stating that they do not make the appointments for the abortions *here* leaves the inference that they perform the abortions in places other than where the telephone call was received.

Page 3, describing the physical method of the abortion procedure leaves no doubt to the actor that the Defendants perform abortions. It is a reasonable conclusion.

Page 4, the Defendants stated that they would not give a referral to the abortion clinic without meeting the actor, when in fact the Defendants never give a referral under any circumstances.

Page 4, the Defendants said that they were "the Women's Health Clinic."

Page 7, the statements that the abortions are done in Fargo *here;* that they do not do them *right at this facility* and that the abortions are done a few blocks away between the 8th and 14th week show false statements and are calculated to lull the actor into believing they perform abortions.

Page 7, again, the stated price of abortions would reasonably infer that they give abortions for that stated price, particularly when they never directly tell the actor that they do not perform abortions.

Page 7, the description of the abortion procedure and timing would reasonably infer that they perform the abortion.

Page 8, the Defendants state that the abortions are done by doctors and this could be inferred that they meant their own doctors, when in fact they had no doctors performing abortions.

Page 8, the actor is told that counseling is desired so the actor would "know what to expect *before and after.*" The actor could reasonably understand that they give abortions.

Page 8, the Defendants stated that the abortion appointment is made at the other facility. This leaves the impression that the other facility is their own facility.

Page 9, again the Defendants stated they were the "Women's Health Clinic" which is clearly against the Preliminary Injunction.

Page 9, when the actor specifically asked if the Defendants did abortions, the answer went into the pregnancy testing, thus leaving the answer to be implied that they did perform abortions.

Page 10, when asked whether they did abortions, the reply was evasive and inferred that they did perform abortions at another facility of the Defendants a couple of blocks away. The Plaintiff corporation's clinic is several miles away.

Page 10, instead of stating that the Defendants did not perform abortions, they left the impression that they gave abortions in a separate organization linked to the Defendant. This is clearly shown by the words "So we're, you know, separate organizations *kind of.*"

Page 10, discussion of the timing of abortions left the actor with the understanding that the Defendants performed the abortions.

Page 11, on a direct question whether the doctors are licensed over there, the Defendants described the doctors and their location and time of arrival. The fact is that they have no doctors.

Page 11, describing the cost of an abortion can reasonably be interpreted that they perform abortions.

Page 13, stating that the abortions are in another clinic in town and that they are open on Fridays leaves the inference that they perform abortions in another of their own facilities, particularly when it would have been so easy and correct to state that the abortion clinic is not their own.

Page 13, the Defendants state they "normally" do not do abortions, which is not true.

Page 13, stating that they counsel after the abortion is not true from the facts in this case. Furthermore, it leaves the impression and inference that they perform abortions.

Page 13, the Defendants state that they do not refer a person unless they counseled them. This is not true in that the Defendants never refer anyone for an abortion.

The totality of all these telephone conversations and the actual visit of Susan Roe clearly show that the advertisements are deceptive. The advertisements are inconsistent with such conversations. The Defendants' course of conduct is quite clear in attempting to make people believe that they perform abortions so that they can counsel with them with the calculated result of delaying the abortion until it would be legally impossible or illegal under the rulings of the United States Supreme Court.

There is sufficient evidence herein to show willful violation of the Preliminary Injunction without this Court having to resort to the legal principle of "adverse inference" when some of the Defendants took the privilege of remaining silent under the Fifth Amendment.

At a hearing before the Fargo City Planning Commission on February 27, 1985, the Defendant Darrold Larson after

inquiry stated that the Defendants' clinic would continue doing business as Womens Help Clinic and would continue to use that name. This was done after the effective date of the Preliminary Injunction.

From such evidence, the Defendants are hereby found to be in civil contempt of court for violating the Preliminary Injunction in the following respects:

1. The Defendants have used the title Womens Help Clinic;

2. The Defendants have made untrue, deceptive, and misleading advertising which was known to the Defendants to be untrue, deceptive, and misleading.

3. The Defendants have falsely lulled people that came to them for counseling into thinking that they are in fact the Fargo Women's Health Organization, Inc., or that the Defendants perform abortions.

4. That the Defendants in their advertisements and contacts have failed affirmatively to state that they do not perform abortions.

ORDER ON CONTEMPT

It is the order of the Court that the Defendants and each of them are in civil contempt of court in failing to comply with the terms of the Preliminary Injunction dated March 1, 1985, and the FM Women's Help and Caring Connection, Inc., shall pay a fine of $500.00 which shall go to the Plaintiffs as a partial cost of attorneys' fees only in prosecuting this contempt proceding; and it is the further order of this Court that the individual Defendants Patricia Larson, Darrold Larson, David Pence, Terri Carlson, John Robertson, Robyn Robertson, and Loralee Isaacson be committed and sentenced to the Cass County Jail at Fargo, North Dakota for a period of thirty (30) days and that the said Defendants may purge themselves by complying with the said Preliminary Injunction immediately. Due to complication with newspapers in changing advertising on short notice, the advertisements shall be in compliance not later than two

weeks from August 19, 1985. This Order on Contempt is effective as of the date of the hearing of August 19, 1985.

Dated this 19th day of September, 1985.

BY THE COURT:

/s/ John O. Garaas
JOHN O. GARAAS
District Judge
East Central Judicial District

**IN DISTRICT COURT, COUNTY OF CASS,
STATE OF NORTH DAKOTA**

Civil No. 85-6

FARGO WOMEN'S HEALTH ORGANIZATION, INC.,
ROBERT LUCY, M.D., GEORGE MIKS, M.D., & JANE DOE,
Plaintiffs,

v.

PATRICIA LARSON, DARROLD LARSON, DAVID PENCE,
TERRI CARLSON, JOHN ROBERTSON, ROBYN ROBERTSON,
LORALEE ISAACSON, DIRECTORS OF THE FM WOMEN'S HELP
AND CARING CONNECTION d/b/a WOMEN'S HELP CLINIC,
Defendants.

NOTICE OF APPEAL

TO: CLERK OF DISTRICT COURT

NOTICE IS HEREBY GIVEN, that the Defendants, Patricia Larson, Darrold Larson, Terri Carlson, John Robertson, Robyn Robertson and Loralee Isaacson, directors of the FM Women's Help and Caring Connection d/b/a as Women's Help Clinic, hereby appeal to the North Dakota Supreme Court from the preliminary injunction entered on the 1st day of March, 1985, in the Cass County Courthouse, by the Honorable John O. Garaas, wherein said Judge ordered that the defendants' advertising be restricted pending the outcome of the litigation, that the defendants stop using the name, "Women's Help Clinic" or comparable words in their advertisements, that defendants stop "falsely and deceptively" advertising that they provide abortions and financial assistance for such services, that defendants to not allow people who come to them for counseling think that they are dealing with the Fargo Women's Health Organization, and that if defendants advertise using the term, "abortion," they must state that they do not

perform abortions. The Honorable Judge Garaas' order is attached.

Dated this ____ day of March, 1985.

/s/_____
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(701) 237-4560

/s/_____
MICHAEL P. FARRIS
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/s/_____
JORDAN W. LORENCE
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IN DISTRICT COURT, CASS COUNTY
STATE OF NORTH DAKOTA
EAST CENTRAL JUDICIAL DISTRICT

FARGO WOMEN'S HEALTH ORGANIZATION, INC., ROBERT LUCY, M.D., GEORGE MIKS, M.D., & JANE DOE,
Plaintiffs,

v.

PATRICIA LARSON, DARROLD LARSON, DAVID PENCE, TERRI CARLSON, JOHN ROBERTSON, ROBYN ROBERTSON, LORALEE ISAACSON, DIRECTORS OF THE FM WOMEN'S HELP AND CARING CONNECTION d/b/a WOMEN'S HELP CLINIC,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON PRELIMINARY INJUNCTION

This matter having come before the Court on Plaintiffs. Fargo Women's Health Organization, Inc., Robert Lucy, M.D. and George Miks, M.D. Motion for temporary Restraining Order And Temporary Injunction pursuant to notice; and Plaintiffs appearing through their counsel William Kirschner and Al Baker, Fargo, North Dakota; and defendants appearing through their counsel Jean A. Samelson, Fargo, North Dakota and Michael P. Farris and Jordan W. Lorence, Washington, D.C.; and the Court having considered all the evidence presented by affidavits and exhibits and the arguments of counsel:

THEREFORE the court makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. Plaintiff, Fargo Women's Health Organization, Inc. is a Florida Corporation doing business in Fargo, North Dakota by providing management services to physicians who provide

medical care including abortions, abortion counseling with birth control counseling, pregnancy testing, patient education, information and referral staff support for physicians, laboratory and clinical facilities and personnel, and other non-medical support services.

2. Plaintiffs Robert Lucy, M.D. and George Miks, M.D. are physicians currently licensed to practice medicine in the State of North Dakota and provide medical care including elective abortions using facilities and support services provided by Plaintiff, Fargo Women's Health Organization, Inc.

3. Defendants are current and past directors of the F-M Women's Help and Caring Connection, Inc.

4. Defendants provide pregnancy testing and counseling with regard to pregnancies including but not limited to women with problem pregnancies considering abortion.

5. Defendants have been using the name Women's Help Clinic since February of 1984.

6. F-M Women's Help and Caring Connection, Inc. is a North Dakota corporation incorporated in June of 1984.

7. The defendants as individuals and as a corporation have conducted false advertising.

8. The advertising conducted by defendants clearly indicate to the average person and the general public that defendants held themselves out as an organization which performs abortions;

9. An average person or the general public reading defendants' advertisements could reasonably conclude that the defendants are performing abortions;

10. Defendants are advertising services that they are not willing to perform and admittedly will not perform;

11. Defendants' advertising that it performs elective abortions is deceptive;

12. Defendants' advertising is confusing to the general public;

13. Defendants' advertising contained assertions, representations or statements of fact which are untrue, deceptive and misleading;

14. Plaintiffs, Fargo Women's Health Organization, Inc., Robert Lucy, M.D. and George Miks, M.C. have suffered irreparable injury as a result of defendants' advertising;

15. The general public has suffered irreparable injuries as a result of defendants' advertising;

16. Plaintiff, Fargo Women's Health Organization, Inc., used the name Women's Health Clinic prior to the use of that name or similar name by the defendants;

17. The defendants use of the name Women's Help Clinic, or comparable words, is misleading. The defendants' use of the name Women's Help Clinic constitutes misleading advertising because that name is too similar to the name of Plaintiff, Fargo Women's Health Organization, Inc. or the name used by that Plaintiff, Women's Health Clinic.

CONCLUSIONS OF LAW

1. A preliminary injunction may be issued during the pendancy of an action and terminates upon completion of the case on the merits;

2. Plaintiffs have submitted sufficient evidence to the Court for the Court to hold that Plaintiffs are entitled to a preliminary injunction pursuant to N.D.C.C. section 32-06-02, Subsection 1 of N.D.C.C. section 32-06-02 states that when it shall appear by the complaint that the plaintiff is entitled to the relief demanded and such relief consists in restraining the commission or continuance of some act, the commission or continuance of which litigation would produce injury to the plaintiff, then the preliminary injunction should be granted.

3. Based on the evidence presented to the Court the Court holds that defendants have violated N.D.C.C. sections 51-12-01 and 52-12-08 by conducting false advertising;

4. The Court believes that defendants' false advertising should be stopped pending the outcome of the litigation on the merits by use of the Court's injunctive powers;

5. North Dakota Century Code section 51-12-14 provides that any person can seek an injunction to prevent harm to the general public;

6. Continued harm to the general public can be enjoined by the Court through the use of its injunctive powers even though it has not been established that an irreparable injury has been sustained;

7. The name Women's Health Clinic could be considered as a trademark of the Plaintiff, Fargo Women's Health Organization, Inc. and that Plaintiff, Fargo Women's Health Organization, Inc. has a prior legal right to the use of the name Women's Health Clinic;

8. The name Women's Help Clinic used by defendants infringes on Plaintiff, Fargo Women's Health Organization, Inc.'s, use of its trademark Women's Health Clinic;

9. Defendants' use of the name Women's Help Clinic is too closely related to Plaintiff. Fargo Women's Health Organization, Inc's, name and its trademark name Women's Health Clinic making defendants use of the same Women's Help Clinic a form of misleading advertisement prohibited by N.D.C.C. sections 51-12-01 and 51-12-08;

10. If the defendants do not perform abortions, they should so state in their advertisements.

ORDER

THEREFORE IT IS ORDERED, that Plaintiffs Motion for a Preliminary Injunction is granted.

IT IS FURTHER ORDERED that the preliminary injunction will be valid during the time this action is pending until it is resolved.

IT IS FURTHER ORDERED that the defendant be enjoined from using the name Women's Help Clinic, or comparable words which are similar, and confusing. The use of the name Women's Help Clinic, or comparable words which are similar, is to be stopped at this time to prevent further confusion.

IT IS FURTHER ORDERED that the defendants individually and collectively, jointly and severally, shall be prohibited from falsely and deceptively advertising that they provide elective abortions and financial assistance for such services.

IT IS FURTHER ORDERED that the defendants do not falsely lull people that come to them for counseling into thinking that they are, in fact, the Women's Health Organization or the Fargo Women's Health Organization, Inc. and that the defendants take no action or inaction which would lull people into believing that they are dealing with the Fargo Women's Health Organization, Inc. when they are in fact dealing with defendants or F-M Women's Help and Caring Connection, Inc.

IT IS FURTHER ORDERED that if the defendants advertise using the term abortion, then they must state that they do not perform abortions.

IT IS FURTHER ORDERED that this Order is effective as of 4:45 p.m. on February 22, 1985.

IT IS FURTHER ORDERED that defendants individually and collectively make every reasonable effort to cancel or stop all further advertising in the manner prohibited by this order.

ORDERED this 1st day of March, 1985.

/s/John O. Garaas
JOHN O. GARAAS
District Court Judge

IN DISTRICT COURT, COUNTY OF CASS
STATE OF NORTH DAKOTA

Civil No. 85-6

FARGO WOMEN'S HEALTH ORGANIZATION, INC., ROBERT LUCY, M.D., GEORGE MIKS, M.D., & JANE DOE,
Plaintiffs,

v.

PATRICIA LARSON, DARROLD LARSON, DAVID PENCE, TERRI CARLSON, JOHN ROBERTSON, ROBYN ROBERTSON, LORALEE ISAACSON, DIRECTORS OF THE FM WOMEN'S HELP AND CARING CONNECTION d/b/a WOMEN'S HELP CLINIC,
Defendants.

MEMORANDUM OF AUTHORITIES IN OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER

I

FACTS

One of the plaintiffs, Fargo Womens [sic] Health Organization,[1] has moved for a temporary restraining order and temporary injunction. Neither of the abortionist-physician plaintiffs, nor the "Jane Doe" plaintiff have sought any relief by way of temporary motion.

According to the Amended Complaint, FWHO, Inc. is a Florida corporation registered to do business in Fargo, North Dakota. FWHO, Inc. is a for-profit company providing management services "to physicians who provide medical care including abortions . . ."[2]

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[1] Hereinafter referred to as FWHO, Inc.

[2] Amended Complaint ¶ 4.

Neither of the abortionist-physicians have filed an affidavit in support of the temporary motions. No officer or employee of FWHO, Inc. has filed a supporting affidavit. The only affidavits filed in support of this motion are of various unnamed persons who have called themselves Jane Doe I through IV. However, it is important to note that these Jane Doe-affiants are not the same person as the Jane Doe-plaintiff. Jane Doe-plaintiff is a truly fictious person. Insofar as is known by counsel for the plaintiffs or by FWHO, Inc. or the abortionist-physicians, Jane Doe-plaintiff does not exist. They have no knowledge if such a person exists, nor do they have any knowledge that such a person desires to bring a lawsuit such as this. Nor do they have any knowledge that Jane Doe-plaintiff is willing to have the Kirschner and Baker Legal Clinic represent her interests in this lawsuit.

No affidavit has been filed by counsel to suggest that he knows the existence of Jane Doe-plaintiff or that he has in any way complied with the rules of ethics which prohibit an attorney from undertaking representation of a person without their consent.

The defendants will not repeat at this point the matters contained in their accompanying affidavit, but incorporate them by reference as if fully set forth.

II

SUMMARY OF ARGUMENT

1. Plaintiff's motion should be denied under local court rules for failure to file a brief contemporaneously with its motion.

2. Plaintiff, FWHO, Inc., has no standing to seek the requested temporary injunctive relief. There is no allegation that this plaintiff has suffered any harm. It has no standing to raise the "harm" suffered by others as a basis for granting its motion.

3. The requested relief would interfere with constitutionally protected rights of free speech and advocacy. It does

not matter that the speech may create an emotional response in the listener. The First Amendment is designed to protect advocacy to action of a controversial nature. The requested restraining order would clearly amount to an unconstitutional prior restraint on free speech.

4. The tradename infringement claim raised by plaintiffs is without merit. Plaintiffs have filed no affidavits establishing their right to a tradename. Nor have they shown that their name is sufficiently distinctive to be protectable as a tradename. Nor have they shown long and exclusive use of the name. Plaintiffs also fall short on the claimed tradename violation because the plaintiffs and defendants offer totally different services. Finally they have made no showing that the defendants' tradename illegally usurps the plaintiffs' tradename.

5. The defendants cannot be enjoined under North Dakota law with respect to false and misleading advertising. That law relates only to commercial advertising. Defendants advertising is wholly non-profit and offers a service totally free to the recipient. Furthermore, the law grants the right to seek injunctive relief only to the Attorney General. This is especially applicable in a case, such as here, where the only claimed injury is to the public and no claim is raised that the plaintiff is actually being injured.

6. The moving plaintiff has totally failed to meet the four-part test to be entitled to a preliminary injunction or restraining order. This test requires that the plaintiff demonstrate (1) a substantial probability that it will prevail on the merits; (2) irreparable injury to itself absent the issuance of the injunction; (3) that the harm to the moving party which would result from failure to grant the injunction would outweigh the harm to the defendant if the injunction is granted; and (4) that the public interest would be well-served by the granting of the injunction. Plaintiffs have failed on all four counts.

ARGUMENT

III

PLAINTIFFS' MOTION SHOULD BE DISMISSED FOR FAILURE TO FILE A SUPPORTING BRIEF

FWHO, Inc.'s motion for a temporary restraining order and temporary injunction was not accompanied by a supporting brief at the time of filing. No supporting brief has been filed by FWHO, Inc. in the interim.

Local Rule 3.2 (c) provides, in pertinent part:

> **Submission on briefs.**
>
> Unless otherwise ordered by the court, upon serving and filing a motion, the moving party shall serve and file a brief.
>
> . . .
>
> (d) Failure to file briefs, or to request the taking of testimony, or oral argument within the prescribed time subjects a motion to summary ruling. *Failure to file a brief by the moving party is an admission that in the opinion of counsel the motion is without merit.*
>
> [Emphasis supplied.]

We concur with the implicit opinion of counsel for FWHO, Inc. concerning this motion. It is wholly without merit and should be subjected to summary ruling of dismissal.

One of the practical ramifications of the failure of plaintiffs to file their brief is that this brief is longer than it would have been if there were focused arguments to which we could respond. Unfortunately, we are left with the task of anticipating the plaintiffs' position and responding to it.

IV

FWHO, INC. HAS NO STANDING TO SEEK THE REQUESTED RELIEF

The only affidavits on file in support of the motion for temporary relief are by Jane Does I through IV. These affidavits

should be summarily stricken for failure to disclose the names of the persons involved.

Defendants have insufficient knowledge concerning these Jane Does to make an appropriate response. It is a fundamental denial of due process to require defendants to respond to the allegations contained in these affidavits without the slightest hint as to whether these people ever had contact with their organization or not.

There is substantial doubt of whether or not these Jane Does, if they even exist, had contact with the defendants. Jane Doe IV, claims that she ended up at "Birthright"[3] and makes various complaints about her treatment there. Birthright is another non-profit, pro-life counseling center engaged in similar pursuits with the defendants herein.[4] However, these organizations are in no way connected and defendants are in no way responsible for actions taken by Birthright.

This confusion on the part of the Jane Does only substantiates the ambiguity caused by the failure to disclose true names of these alleged affiants.

More importantly, not one of the Jane Does I through IV is actually a party to this litigation. None of the actual parties have filed any affidavit suggest how that *they* are being harmed by the conduct of the defendants.

In each situation which was described in the Jane Doe affidavits, the plaintiffs were able to successfully carry out their business of taking the lives of unborn children for monetary profit.

Specifically, the moving party FWHO, Inc., has made no allegation that it has been harmed in any way. There is no allegation that it has lost a single dollar or that the defendants have saved a single life from the "management services" of

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[3] See ¶ 11 of Jane Doe IV affidavit.

[4] See affidavit of Pat Larson of February 19, 1985.

FWHO, Inc. The evidence provided by the plaintiffs themselves is that FWHO, Inc.'s monetary and "death management" interests have not been adversely affected by the activities of the defendants.

The most that can be proven by way of the Jane Doe affidavits is that they were emotionally upset by the actions of the defendants or by persons these Jane Does thought were the defendants (i.e.-Birthright). FWHO, Inc. has no standing to seek a temporary restraining order on the basis of this minimal inconvenience "suffered" by others.

A plaintiff can only seek an injunction if *its own interests* are being harmed in some way. See, e.g. *McIntyre* v. *State Board of Higher Education*, 3 N.W.2d 463 (N.D. 1942); *Gillies* v. *Radke*, 54 N.W.2d 155 (N.D. 1952).

Given the failure of the only moving party, FWHO, Inc., to suggest any harm that it has suffered or that it would suffer in the future, the motion must be denied.

V

THE REQUESTED RESTRAINING ORDER WOULD INTERFERE WITH CONSTITUTIONALLY PROTECTED SPEECH AND ADVOCACY

> Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.
>
> —*Bantam Books* v. *Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 9 L.Ed. 2d 584 (1963).

The subject of abortion is one of the most hotly debated political and social topics in this country today. There are strong advocates on both sides. Those who believe that abortion is a constitutional right not only advocate that right in the political and legal realm, they act out their belief by actually providing abortion services.

Those who oppose the taking of the life of innocent children also strongly advocate their position. This advocacy is not

confined to the legislatures, the courtrooms, and the picket lines. Pro-life advocacy also takes the form of providing alternative services for women with problem pregnancies in order to give these women legitimate, workable alternatives to abortion.

Both sides of the abortion controversy have political, emotional, moral, religious, legal, medical, and practical aspects.

However, both sides of the abortion controversy do not have a commercial aspect, at least in this case. Only the plaintiffs operate a for-profit institution which has the financial goal of making a profit by terminating the lives of unborn children.

The Women's Help Clinic, the primary defendant, has no commercial aspect. It is a non-profit, free clinic providing pregnancy testing and counseling as a part of its program of advocacy of a pro-life position.

It is beyond debate that the question of abortion is a question within the public domain and is the proper subject for political and social debate and action.

The moving plaintiff seeks a judicially imposed prior restraint against the rights of the defendants to advocate their pro-life position with respect to abortion. The request for a restraining order which prohibits the use of the name Women's Help Clinic, prohibits allegedly false and misleading advertising, and which seeks a mandatory injunction requiring the defendants to refer all those seeking abortions to the plaintiffs, may be denominated a restraining order or an injunction, but in reality it is a prior restraint on free speech.

The United States Supreme Court made this proposition unmistakeably clear in the case of *Kingsley Books* v. *Brown*, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed. 2d 1469 (1957). In that case the Court remarked upon the fact pattern in *Near* v. *Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), saying:

> Minnesota empowered its courts to enjoin the dissemination of future issues of a publication because past issues

> had been found offensive. In the language of Mr. Chief Justice Hughes, "this is of the essence of censorship."
>
> 354 U.S. at 445.

Even though obscenity is clearly unprotected by the First Amendment, past obscene publications are not considered valid grounds for judicial suppression of future speech. In the case of *Vance* v. *Universal Amusement Co.*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed. 2d 413 (1980), the Supreme Court invalidated a state law which would permit a court to order a motion picture theater or bookstore closed and padlocked if it had shown obscene publications in the past. The Court reasoned that just because the speech was obscene in the past, it did not mean necessarily that future speech would also be unprotected obscenity.

It should be noted that in both *Vance* and *Near*, commercial publications were involved. Here we are dealing with a non-commercial advocacy group which is the target of the would-be censor. If the First Amendment protects pornographers and commercial publishers, it certainly also protects the non-commercial political and social advocacy of the defendants with respect to abortion.

Assuming *arguendo*, that past ads of the defendants were false and misleading, the First Amendment prohibits a prior restraint on future ads. The most the Constitution will permit is the punishment for the abuse of the right of free speech. Prophylatic punishments are constitutionally impermissible prior restraints.

In another case before the High Court, a white supremacy group advocated its philosophy in very volatile terms at a series of rallies. Local authorities sought and obtained restraining orders against these activities. The Court overturned these restraining orders saying: "Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgement." *Carroll* v. *Commissioners of Princess Anne County*, 393 U.S. 175, 181, 89 S.Ct. 347, 21 L.Ed. 2d 325 (1968).

By their request to stop the defendants advertising and by their request that defendant be required to refer all women seeking abortions to them, plaintiffs seek to stop the defendants from advocating to pregnant women that they should not have abortions. They dwell on the emotionality of the Jane Does who experienced trauma with respect to their decision to have an abortion in order to justify their attempted censorship.

Trauma and emotionality provides no basis for an exception to the constitutional right of free speech. Only obscenity, fighting words, treason, and words creating a clear and present danger to the compelling interest of the state fall outside the scope of constitutional protection. It is upon the very subjects which are the most emotional and most controversial where the First Amendment serves its greatest purpose.

Freedom of speech would mean very little if it applied only to non-controversial topics. The Supreme Court has said:

> [A] function of free speech . . . is to invite dispute. It may best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance.
>
> —*Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949).

Defendants' First Amendment rights to free speech are not limited to mere description of facts relative to abortion. They have the constitutionally protected right to advocate actions consistent with their position. The Supreme Court has said:

> [The First Amendment] extends to more than abstract discussion, unrelated to action. The First Amendment is a charter for government, nor for an institution of learnings. "Free trade in ideas" means free trade in the opportunity to persuade to action, not merely to describe facts.
>
> —*Thomas* v. *Collins*, 323 U.S. 516, 537 (1945).

Just as it is improper to censor speech because of it controversial nature or because it advocates action and persuasion, so

too it is unconstitutional to restrict speech because of its subject matter or content. The Supreme Court has held that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department* v. *Mosely*, 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed. 2d 212 (1972).

It does not matter if the plaintiffs are able to prove the disputed proposition that the defendants' presentations are stark or harsh. It also does not matter that if the plaintiffs can prove the equally disputed proposition that those coming to the defendants are upset by their presentation. It does not matter if they prove that the defendants are explaining the controversial subject of abortion. We would stipulate to that point. Regardless of its emotionality, effect on the hearers, or the subject matter, the First Amendment guarantees the right of advocacy by the defendants with respect to abortion.

The Supreme Court has held, in a commercial speech case, that the advertising about abortion (with regard to a state where at the time of the advertising abortion was illegal) is constitutionally protected. In *Bigelow* v. *Virginia*, 421 U.S. 809, the Court said:

> The legitimacy of appellant's First Amendment claim in the present case is demonstrated by the important differences between the advertisement presently at issue and those involved in *Christensen* and in *Pittsburgh Press*. The advertisement published in appellant's newspaper did more than simply propose a commercial transaction. It contained factual material of clear "public interest." Portions of its message, most prominently the lines, "Abortions are now legal in New York. There are no residency requirements," involved the exercise of the freedom of communicating information and disseminating opinion.
>
> Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seek-

> ing reform in Virginia. The mere existence of the Women's Pavilion in New York City, with the possibility of its being typical of other organizations there, and the availability of the services offered, were not unnewsworthy. Also, the activity advertised pertained to constitutional interests, *Roe* v. *Wade*, *Doe* v. *Bolton* (citations omitted). Thus, in this case, appellant's First Amendment interests coincided with the constitutional interests of the general public.
>
> —421 U.S. at 821-822.

The First Amendment does not protect only one side of a controversial issue. In *Bigelow* those running the advertisements were pro-abortion. In this case the defendants are running pro-life advertisements. The attempt to silence their advertisements, their tradename, and the onerous requirement of referring all those who desire an abortion to the plaintiffs is no more constitutionally acceptable in this case than in *Bigelow*.

The attempt to give pregnant women only the view of the plaintiffs is an attempt to permit only their view to be heard. The plaintiffs cannot tolerate anyone who effectually dissents from their viewpoint. A particularly applicable ruling of the Supreme Court which comments on those who would silence their political opponents should be noted:

> Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> —*West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 641 (1943.)

The plaintiffs are in the profit-making business of exterminating children which have been determined to be inconvenient. It is not surprising that they would take the position that they have the right to eliminate dissent. It is not convenient either.

VI

FWHO, INC.'S CLAIM OF TRADE NAME VIOLATION IS WITHOUT MERIT

In our previously filed Brief in Support of Motions [to dismiss], we have set forth the law with regard to claiming a trade name and an infringement of such tradename. Without repeating the argument at length, it is clear that the moving plaintiff possesses no legally cognizable tradename, nor has there been an adequate showing of any violation of the tradename.

The plaintiff has not established a protectable tradename for two main reasons. First, a word or combination of words which merely describe a good or service, or its composition, characteristics, or qualities cannot be appropriated and protected as a tradename. 74 Am. Jur.2d, Trademarks and Tradenames, § 50. No one has the right to limit the use of language common to all. *Id.* None of the words in the claimed tradename are distinctive, rather they are ordinary words which describe a service and thus are not protectable. The combination of words achieves the same result—these are ordinary words and phrases which are not distinctive in any protectable manner.

The second reason plaintiff's name is not protectable is that it has failed to meet the distinctiveness test though long-continued exclusive use. As set forth in our prior brief, federal law sets the standard of five years of continuous and exclusive use before there is an inconstestable right of usage. Plaintiff has not used the name Fargo Women's Health Organization or any of its variations for the required length of time. Moreover, its usage has not been exclusive. The Women's Help Clinic has been in operation using that name since February, 1984.

Even if the moving plaintiff could demonstrate that it has a protectable tradename, there has been a total failure of proof that the name FM Women's Help and Caring Connection, Inc. or FM Women's Help Clinic violates plaintiff's protectable interest.

The Jane Doe affidavits are totally insufficient to prove any tradename violation. Moreover, on the face of it the Womens

[sic] Health Organization and the Women's Help Clinic are in totally different businesses. The Health Organization performs abortions. The Help Clinic counsels women to choose a life-alternative to abortion.

The purpose of the tradename law is to prevent one business from taking another business's customers and then selling them the *same* goods or services which the possessor of the tradename would have sold.

For example, McDonald's, Inc., could prevent a person from opening a hamburger stand using the name McDonald's in Fargo. But McDonald's Inc. would be powerless to prevent a McDonald's Pet Shop from opening. Likewise it would likely be powerless to prevent opening of a restaurant calling itself McDonald's Steak and Lobster Emporium. Anyone familiar enough with McDonald's to recognize the tradename would also be familiar enough to know that McDonald's hamburger stands do not sell steak and lobster.

The Womens [sic] Health Organization and the Women's Help Clinic are in businesses as different as hamburgers and steak and lobster.

Moreover, there is no proof that the names are confusing in a legally protectable manner. The affidavits of the Jane Does do demonstrate confusion, but they demonstrate too much confusion to aid the cause of the plaintiff. Jane Doe IV, for example, confused Birthright, with both the Womens [sic] Health Organization and the Women's Help Clinic. Birthright's name is not even close to either of the other names, but Jane Doe IV thought she was at the Womens [sic] Health Organization. Counsel for the plaintiff apparently thought that Jane Doe IV was at the Women's Help Clinic.

All that has been proven is that women who decide to get abortions are confused. It is the defendants' desire to give such women help and counseling.

The only ongoing advertising activity which this court can possibly address is the newspaper advertisements in the Fargo

Forum. The telephone ads for the coming year have been ordered since December and cannot be changed. The newspaper's policy of requiring each of these parties to declare themselves as "pro-choice" in the case of the plaintiff or "pro-life" in the case of the defendants, eliminates even the remote possibility that a real person could be confused by the two groups.

Anyone remotely familiar with abortion understands the terms "pro-choice" and "pro-life" sufficiently to know that these are entirely different sorts of clinics offering totally different kinds of services.

The term "health" in plaintiffs' name connotes medical services, while the term "help" in defendant's name connotes counseling and assistance. These terms are accurate and not confusing to rational and real people.

VII

DEFENDANTS HAVE NOT ENGAGED IN ANY FALSE OR MISLEADING ADVERTISING

The North Dakota Law on Consumer Fraud and Unlawful Credit Practices, which contains the prohibition against false and misleading advertising is not applicable to the activities of the defendants.

The defendants are engaged in a non-profit counseling ministry. The recipient of their services pays nothing whatsoever.

N.D. Cent. Code § 51-15-01 defines the term "Sale" as "any sale, offer for sale, or attempt to sell any merchandise for any consideration." The term "Advertisement" is defined, pertinent part, as "the attempt by publication . . . to induce directly or indirectly any person to *enter into any obligation or acquire any title or interest in merchandise.*"

Defendants offer no goods or services for any consideration. Therefore, they are not engaged in any "sale" within the meaning of Chapter 51-15, North Dakota Law. Moreover, they do not induce any person to "enter into any obligation or acquire any

title or interest in merchandise." Therefore, they are not engaged in any "advertisement" within the meaning of North Dakota Law. The law which prohibits unfair and deceptive consumer practices is not invoked unless a "sale" or "advertisement" as defined above, is involved.

Furthermore, there is nothing in the ads of the defendants which are false or misleading. They never claim to provide abortions. With the recent requirement of the newspaper that all ads include the words "pro-life" the remote possibility of confusion is entirely removed.

Finally, even if the ads were commercial and thus subject to the statute, and even if they were false, and even if they were not constitutionally protected, all of which are manifestly not the case, the plaintiffs would still have no right to complain because the statute gives the right only to the Attorney General to seek an injunction to prohibit false and misleading advertising. N.D. Cent. Code § 51-15-07. The plaintiffs have no standing to assert the right of the Attorney General in this regard.

The Supreme Court of North Dakota has taken a very strict position with regard to the right to seek an injunction. In *State ex rel. Holloway* v. *First American Bank & Trust Company*, 186 N.W.2d 573, 577 (N.D. 1977), the court held that one state agency could not use the statutory power granted to another state agency to seek an injunction against a financial institution. Only the state agency and the Attorney General who were designated by statute had the right to seek an injunction. The second agency which was not granted this power by the legislature could not use the statutory authority granted to another agency to seek an injunction of the statute.

Therefore, if one state agency cannot "borrow" the power to seek an injunction from another state agency, it is beyond dispute that a private litigant cannot "borrow" the power of the Attorney General to seek an injunction with respect to false advertising.

This is especially true when, as here, there is no claim that the plaintiff is being harmed, rather the claim is that members of the public are being misled. The right to represent the members of the public lies exclusively with the Attorney General. There is not a single allegation that the moving plaintiff has been harmed in any way by the advertising. FWHO, Inc. is powerless to complain that others are being harmed. It cannot usurp the role of the Attorney General.

VIII

FWHO, INC. HAS NOT MET THE CRITERIA TO BE ENTITLED TO A TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

The general rule of law with respect to entitlement to a temporary restraining order or preliminary injunction was recently set out in a federal appellate case from North Dakota as follows:

> In *Minnesota Bearing Co.* v. *White Motor Co.*, 470 F.2d 1323, 1326 (8th Cir. 1973), this court articulated the proper standard for obtaining preliminary injunctive relief: (1) whether there is a substantial probability movant will succeed at trial; (2) irreparable injury to the moving party absent the issuance of the injunction; (3) harm to the other interested parties if the relief is granted; and (4) the effect on the public interest.
>
> —*Jensen* v. *Dole*, 677 F.2d 678 (8th Cir. 1982).

This four-part requirement for the granting of preliminary injunctive relief is uniformly followed throughout the nation, although North Dakota state court appellate decisions have not directly addressed the point one way or the other.

This general rule is set forth, in pertinent part, in the following summarization in 42 Am. Jur. 2d § 286:

> . . . [I]n exercising its discretion to grant or deny a temporary injunction, the court takes into consideration the probability of the ultimate success or failure of the suit.

> Injunction is properly granted where it appears that the plaintiff's ultimate success in the case is certain or reasonably probable, and that a continuation by the defendant of the acts complained of until the final hearing will work substantial and irreparable injury to the plaintiff.

Plaintiffs do not even come close to satisfying the first of this four-part test for preliminary injunctive relief. The chance that plaintiffs will ultimately prevail in this case is miniscule at best. The fact that plaintiffs have not filed a brief in this matter is not, it would appear, simply a matter of oversight, there is no body of authority to support their proposition that an abortion clinic can censor its critics in the manner attempted herein.

We have set forth the law which adequately demonstrates that the advocacy of a pro-life position by defendants is totally within the zone of constitutionally protected activity. We also set forth *supra*, the law with respect to trade names, false advertising, and the request for compelled referalls for abortion to demonstrate that the plaintiffs have little chance for success even if there was constitutional defense to this action.

The heavy presumption which lies against the attempt to erect a prior restraint on free speech is not likely to be overcome.

The second requirement to be entitled to a preliminary injunction is also absent from FWHO, Inc.'s motion. There is no suggestion whatsoever that irreparable injury to the moving party, FWHO, Inc., will result absent issuance of the injunction. FWHO, Inc.'s alleged injuries are purely financial. If there is injury to it, it is capable of adequate remedy at law by way of monetary damages. It is axiomatic that there is no injunctive relief available to a party unless it can be demonstrated that their remedy at law is wholly inadequate. *Bismark Water Supply Co.* v. *Barnes*, 30 N.D. 555, 153 N.W. 454 (1915); *Continental Hose Co. No. 1* v. *Mitchell*, 15 N.D. 44, 105 N.W. 1108 (1906).

The third criteria also weighs in favor of the defendants. This requirement requires a balancing of the harm to the plaintiffs if

the injunction is not granted versus the harm to the defendants if the harm is granted. This requirement is clearly set forth in several North Dakota cases. See, e.g., *Graven* v. *Bachus*, 163 N.W.2d 320 (N.D. 1968).

If the preliminary injunctive relief is not granted plaintiff FWHO, Inc., at most, will suffer financial harm. Women could be convinced by the defendants not to have an abortion and FWHO, Inc. would lose its share of the financial gain coming from taking the life of that unborn child.

On the other hand, if the injunctive relief is granted, the defendants lose something more valuable than money. It should again be noted that defendants receive no money from any pregnant women for their services. Unlike plaintiffs, defendants are not motivated by monetary gain and as a consequence, the damage to them if an injunction is issued would interfere with more than their finances.

Their rights to free speech would be censored and subjected to a heavy prior restraint. If the third prong of the requested injunction is granted [the request that defendants refer all those seeking abortions to plaintiffs so that they can terminate the life of the unborn child] is such a heinous violation of the rights of conscience guaranteed by the Free Exercise Clause of the First Amendment. Defendants would suffer immeasurable harm if they were required to, in their view, refer women to a facility intent on killing an innocent child.

Our nation has fought wars to preserve freedom of speech and freedom of religion. We have never fought a war to preserve the right to make a profit by terminating the life of unborn children. The balance must be struck in favor of the First Amendment freedoms having precedence over the prospect of financial gain.

Finally the public interest clearly would not be well-served by a course of judicial censorship. Although there may be diverse views on the subject of abortion, our nation has long been committed to preserving the freedom to debate topics of

importance. The American public is never well-served by a policy of restraint on debate of a topic of political and moral importance.

Dated this 19th day of February, 1985.

Respectfully submitted,

MICHAEL P. FARRIS

and

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**IN DISTRICT COURT, COUNTY OF CASS,
STATE OF NORTH DAKOTA**

Civil No.: 85-6

FARGO WOMEN'S HEALTH ORGANIZATION, INC.,
ROBERT LUCY, M.D., GEORGE MIKS, M.D., & JANE DOE,
Plaintiffs,

v.

PATRICIA LARSON, DARROLD LARSON, DAVID PENCE,
TERRI CARLSON, JOHN ROBERTSON, ROBYN ROBERTSON,
LORALEE ISAACSON, DIRECTORS OF THE FM WOMEN'S HELP
AND CARING CONNECTION d/b/a WOMEN'S HELP CLINIC,
Defendants.

AFFIDAVIT OF PATRICIA LARSON

Affiant, Patricia Larson, in this proceeding, states and alleges:

1. I am one of the directors of the FM Women's Help and Caring Connection, Inc. We have been in operation using the name Women's Help Clinic since February of 1984.

2. Our services are operated on a totally non-profit basis. We not only make no profit, we do not charge any of the recipient's of our services anything whatsoever for coming to us for help.

3. We provide free pregnancy testing and counseling with regard to pregnancies, including but not limited to women with problem pregnancies who might consider abortions.

4. Our primary reason for opening and operating this clinic was to offer practical help for our advocacy of a pro-life position with respect to abortion. We operate the clinic as an expression of our political, moral, and religious beliefs that abortion is morally wrong. It is also an expression of our political, moral,

and religious beliefs, that as Christians we have a duty to help those in need. We view the operation of this clinic as our statement of advocacy to the entire community that politically, morally, and religiously the practice of abortion is unacceptable. By our actions we are calling for a change with regard to this social policy.

5. Our advertisements all are done with a view toward our political, moral, and religious position that abortion is wrong. They are also done with a view toward our belief that those in need should be helped.

6. Since approximately April 14, 1984, the local newspaper, the *Fargo Forum* has required our organization to include the words "pro-life" in each of our ads. We have complied with this policy in every advertisement that we have made since that date. Likewise, the *Forum* has required the Women's Health Organization to use the words "pro-choice" which they have done since that date. I have never known the Women's Health Organization to refer to themselves as the Women's Health Clinic until they did so in the papers they have filed in this lawsuit. There is no reasonable possibility that any person will be confused by reading these two ads side-by-side. The words pro-life and pro-choice are well-known phrases in the abortion debate. Anyone old enough and mature enough to make an intelligent decision about abortion knows and understands the meaning of the pro-life and pro-choice phrases. In fact it was the newspaper itself which decided that these phrases would be the appropriate ones to demonstrate that one facility performed abortions while ours counseled against them. The Women's Health Organization went even further and have consistently advertised that their facility is the only one in Fargo where an abortion can be obtained. No one could possibly be confused by these ads which have appeared virtually side-by-side every time the *Forum* is published.

7. There is another pro-life group in Fargo operating a clinic under the name "Birthright." We are in no way connected with Birthright. The affidavits filed by various Jane Does indi-

cate that they went to Birthright. We certainly would have had nothing to do with any activities at Birthright, just as Birthright has no responsibility for our activities.

8. I have no way of knowing how to respond to any of these Jane Doe affidavits. The affidavits are extremely confused especially with regard to Birthright and our organnization. I do not know how to respond until I know who, if anyone, I am actually dealing with.

9. It would be impossible for me or anyone else connected with our organization to refer anyone to the plaintiffs for an abortion. It would require a total denial of our religious faith to participate in the procurement of the death of an unborn child by referring them to the plaintiffs. It is our right and our duty to advocate pro-life principles to all who call on us, regardless of what their thinking is to begin with. The right to advocate our position would be worth little if we were restricted to advocating our position only to those who agreed with us in advance.

FURTHER, your affiant sayeth not.

Dated this ____ day of February, 1985

PATRICIA LARSON

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

Subscribed and sworn to before me by Patricia Larson this ____ day of February, 1985.

NOTARY PUBLIC

IN DISTRICT COURT, CASS COUNTY
STATE OF NORTH DAKOTA
EAST CENTRAL JUDICIAL DISTRICT

FARGO WOMEN'S HEALTH ORGANIZATION, INC., ROBERT LUCY, M.D., GEORGE MIKS, M.D., & JANE DOE,
Plaintiffs,

v.

PATRICIA LARSON, DARROLD LARSON, DAVID PENCE, TERRI CARLSON, JOHN ROBERTSON, ROBYN ROBERTSON, LORALEE ISAACSON, DIRECTORS OF THE FM WOMEN'S HELP AND CARING CONNECTION d/b/a WOMEN'S HELP CLINIC,
Defendants.

AFFIDAVIT OF JANE BOVARD

Jane Bovard, being duly sworn, deposes and states as follows:

1. That I am the administrator for the Fargo Women's Health Organization, Inc. and have been so since October 1, 1981.

2. The Fargo Women's Health Organization, Inc. is the only facility in Fargo which performs elective abortions.

3. In approximately February 1984 I became aware of an organization advertising that they performed abortions services called Women's Help Clinic of Fargo. I became aware of such organization through my reading of the Fargo Forum and the Northwestern Bell Telephone Company directory.

4. On March 8, 1984 attorney Cynthia A. Phillips wrote to the Fargo Women's Help Clinic informing them of the confusion inherent in the use of their names and demanded that they stop such use. A copy of that letter is attached hereto and made a

part hereof. Defendant Darrold Larson was again notified by a letter dated June 8, 1984 and hand delivered by Plaintiff's attorney Alan Pollack to defendant's then-attorney Wayne Aarestad to cease and desist from using the same similar names. In addition, Plaintiff had at that time reserved the use of the corporate names Fargo Women's Help, Fargo Women's Help Clinic, Women's Help Clinic, and Women's Help Organization, and had so informed the defendant Darrold Larson.

5. That on March 7, 1984 I wrote to Mr. Ben Meier, Secretary of State expressing my concern with the confusion caused by the defendant's use of a deceptively similar name. The Secretary of State, in a letter dated March 20, a copy of which is attached hereto and made a part hereof, informed me that the business entity had not filed any papers with his office and that he could not assist me.

6. To my knowledge the Fargo Women's Health Organization, Inc. is commonly known in the community as Women's Health Clinic, Women's Health Center, and Women's Health Organization Clinic and Women's Clinic. Attached hereto and made a part hereof are several articles and newspaper clippings from the Fargo Forum. Minneapolis Tribune and North High School's "Spartan Scroll" which so refer to the Fargo Women's Health Organization, Inc. From the time our facility opened until the present it has been our practice when receiving income telephone calls to answer the phone "Women's Health" or "Fargo Women's Health."

7. Recently we received a letter from the FHA girls, a copy of which is attached hereto and made a part hereof, which contained a thank you to Pat Larson for her informative talk on abortion. The letter was addressed to Women's Health Organization at our address.

8. Since February 1984 I have received numerous communications, approximately five per week, from many people, including the affiant's in this case, who have indicated that they have mistakenly called the Women's Help Clinic, thinking they were calling Fargo Women's Health Organization, which sup-

ports their right to choose an abortion. These vulnerable, misled women reach the Women's Help Clinic, which tries to dissuade them from seeking an abortion with distorted information about the procedure and its consequences. Women's Help Clinic has stalled and delayed women who have called them, to the point that these women have had to get more dangerous and expensive second trimester abortions because of such delay.

Numerous women have appeared at our facility and indicated that they had either made an appointment for a pregnancy test or had an appointment to see Pat. We explained to them that we don't make appointments for pregnancy tests, but do them on a drop-in basis and/or that no Pat works for Fargo Women's Health Organization. They then report that they found the phone number in the telephone book and thought they were contacting the abortion facility and therefore came to our building. We also fully explain the difference between ourselves and Women's Help Clinic and tell them they have a choice in where they can go. In every case, the clients have indicated they wanted abortion services. The women we see who have been to Women's Help Clinic are much more anxious, scared, frightened, and tense which results in the procedure being more difficult and dangerous to the patient. These patients inform us that the people at Women's Help Clinic tell them that they can hemorrhage to death on the table, that they can have their insides sucked out and that if they have any complications Fargo Women's Health Organization will not help them and that once they leave Fargo Women's Health Organiztion, Fargo Women's Health Organization will have nothing more to do with them. In reality none of these complications have arisen although our doctors have performed over 3,000 procedures since opening and in addition we have 24 hour medical backup and we have assisted every patient who has informed us of any complications.

9. I have seen the affidavit of Patricia Larson wherein she indicates she is not a director of the Women's Help Clinic. Attached hereto and made a part hereof is a copy of a business

card given to us by a patient. Said card indicates that Patricia Larson is the Director of the Women's Help Clinic.

Further this affiant sayeth not.

DATED this 21st day of February, 1985.

/s/Jane Bovard
JANE BOVARD

Subscribed and sworn to before me this 21st day of February, 1985.

/s/ William Kirschner
WILLIAM KIRSCHNER
Notary Public
Cass County, North Dakota
My commission expires: 12/11/87

IN DISTRICT COURT, CASS COUNTY
STATE OF NORTH DAKOTA
EAST CENTRAL JUDICIAL DISTRICT

FARGO WOMEN'S HEALTH ORGANIZATION, INC., ROBERT LUCY, M.D., GEORGE MIKS, M.D., & JANE DOE,
Plaintiffs,

v.

PATRICIA LARSON, DARROLD LARSON, DAVID PENCE, TERRI CARLSON, JOHN ROBERTSON, ROBYN ROBERTSON AND LORALEE ISAACSON, DIRECTORS OF FM WOMEN'S HELP AND CARING CONNECTION d/b/a WOMEN'S HELP CLINIC,
Defendants.

AMENDED COMPLAINT

FIRST CAUSE OF ACTION

Plaintiff, Fargo Womens Health Organization, Inc., Robert Lucy, M.D., and George Miks, M.D. for their cause of action against the defendants says as follows:

1. Plaintiff, Fargo Women's Health Organization, Inc. is a Florida corporation registered to do business and currently doing business in Fargo, North Dakota. Plaintiff is commonly known in the community as the Women's Health Clinic and Women's Health Center.

2. Plaintiffs, Robert Lucy, M.D. and George Miks, M.D. are physicians currently licensed to practice medicine in the State of North Dakota. Said plaintiffs provide medical care including elective abortions and contract with Plaintiff, Fargo Women's Health Organization, Inc., who provides facilities and support services.

3. The defendants are the directors of the FM Women's Help and Caring Connection which sponsors the Women's Help

Clinic. Defendant Patricia Larson is the Director of the Women's Help Clinic. Said Women's Help Clinic is currently located in Fargo, North Dakota and is doing business in Fargo, North Dakota.

4. Plaintiff Fargo Women's Health Organization, Inc. has been in the business of providing management services to physicians who provide medical care including abortions, abortion counseling with birth control counseling, pregnancy testing, patient education, information and referral staff support for physicians, laboratory and clinical facilities and personnel, and other non-medical support services in Fargo since September, 1981.

5. The Women's Help Clinic is now and has been for some time in the past, through advertising and other means, holding itself out to the public as a provider of elective abortion services.

6. The Women's Help Clinic, in contrast to such representations, does not provide elective abortion services and, in fact discourages those who contact it from having abortions.

7. That such holding out to the public has occurred through the use of advertising in the Fargo Forum and the Telephone Directory, copies of which are attached to this Complaint as Exhibit "1."

8. That such advertising by the Women's Help Clinic is untrue, deceptive, and misleading and the Women's Help Clinic knows such advertising to be untrue, deceptive and misleading and such advertising is done with the intent to deceive women who have decided to have abortions and to prevent these women from having abortions.

9. That the names Women's Help Clinic and Fargo Women's Health Organization are sufficiently similar to confuse the average person who would be calling such organizations especially in view of the fact that the Fargo Women's Health Organization, Inc. is commonly known in the community as Women's Health Center and Women's Health Clinic.

10. That such similarity is made more confusing by the deceptive and misleading advertising done by the Women's Help Clinic wherein they appear to be providing elective abortion services and financial assistance for such services, when in fact no such service or assistance for such services are provided.

11. That the choice of the name Women's Help Clinic by the FM Women's Help and Caring Connection was and is calculated to deceive prospective patrons of the plaintiff and designed to interfere with women in the exercise of their constitutional right to choose to terminate a pregnancy by abortion and the effect of the use of such name and such advertising is to confuse many people, and to cause harm and damage to plaintiffs business.

12. The Women's Help Clinic's intentionally fails to inform people contacting it that it is not an abortion clinic and intentionally deceives people into believing that it performs abortions in order to prevent those people from contacting Plaintiff.

13. Plaintiffs are the only provider of elective abortion services in Fargo and FM Women's Help and Caring Connection's intentional interference with women seeking elective abortions damages Plaintiff.

14. That plaintiffs have heretofore demanded that defendant discontinue the use of it's deceptively similar name and deceptive advertising, but the defendants have failed and refused to do so.

15. That plaintiffs have never granted or given defendants authority or permission to use plaintiff's name or one similar.

16. That in addition to confusing and deceiving the general public and depriving the plaintiff's of potential patrons, the actions of the defendants will result in harm to the plaintiff and the general public which is irreparable. That the plaintiffs remedy at law is wholly inadequate and the failure to enjoin the continuing actions of the defendants would continue to produce injury to the plaintiffs.

SECOND CAUSE OF ACTION

Plaintiff, Jane Doe, for her cause of action against the defendants says as follows:

1. Plaintiff is an unknown pregnant woman who has decided to terminate her pregnancy by abortion in the first trimester.

2. Plaintiff realleges paragraphs 1 through 16 of plaintiff Fargo Women's Health Organization's complaint.

3. During her first trimester plaintiff decided to have an abortion.

4. Because of confusing and misleading advertising, plaintiff contacted the Women's Help Clinic to arrange an abortion.

5. Plaintiff contacted said Women's Help Clinic and was told that she had to come in for an appointment before she could have the abortion performed.

6. Plaintiff arranged and kept said appointment and at said appointment was told that she had to have a physical exam with the defendant's doctor before an abortion could be performed and that she would have to receive further counseling.

7. That plaintiff saw defendant's doctor and had such exam and went for further counseling. That after this was done, defendants then informed plaintiff that they would not assist or perform her abortion.

8. That defendants never indicated to plaintiff that they were not an abortion clinic and never informed plaintiff that they did not perform abortions until after the time at which plaintiff could legally and safely have an abortion.

9. That because of defendant's deception the plaintiff was forced to continue her pregnancy to term.

10. That because of the intentionally misleading extreme and outrageous conduct of the defendants the plaintiff was caused severe emotional distress.

WHEREFORE, Plaintiff pray for the following relief:

1. That the defendants and their agents and confederates be enjoined from continuing to use the name Women's Help Center or any other name similar to that of the Plaintiff;

2. That the defendants and their agents and confederates be enjoined from continuing to falsely and deceptively advertise themselves as the provider of abortion services and financial assistance for such services;

3. That the defendants be ordered to direct any person contacting them for abortion services to the plaintiffs until such time as this Court orders otherwise;

4. That plaintiffs have judgment against defendants for the amount of damages this court finds said defendants have caused plaintiff by the acts heretofore sated;

5. That plaintiffs have judgment against defendants for it's attorneys fees and cost of this suit;

6. That plaintiffs have judgment against defendants for exemplary damages in an amount sufficient to deter such continuing conduct by the defendants.

7. That plaintiffs have judgment against defendants for such other and further relief as to this court may seem just and proper.

Dated this 11 of January, 1985.

KIRSCHNER AND BAKER LEGAL CLINIC

/S/ WILLIAM KIRSCHNER
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Attorneys for Plaintiffs
17 South 8th Street
Fargo, North Dakota 58103
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IN DISTRICT COURT, CASS COUNTY
STATE OF NORTH DAKOTA
EAST CENTRAL JUDICIAL DISTRICT

FARGO WOMEN'S HEALTH ORGANIZATION, INC., ROBERT LUCY, M.D., GEORGE MIKS, M.D., & JANE DOE,
Plaintiffs,

v.

PATRICIA LARSON, DARROLD LARSON, DAVID PENCE, TERRI CARLSON, JOHN ROBERTSON, ROBYN ROBERTSON AND LORALEE ISAACSON, DIRECTORS OF THE FM WOMEN'S HELP AND CARING CONNECTION d/b/a WOMEN'S HELP CLINIC,
Defendants.

MOTION FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION

Comes now the Plaintiff, Fargo Womens Health Organization, Inc., by and through it's attorneys, Kirschner and Baker Legal Clinic, and upon the basis of Plaintiffs Complaint and the Affidavits filed with this Motion moves the Court for an order temporarily restraining or enjoining the defendants, their agents and confederates herein from the following:

1. Further using the name Women's Help Clinic or any other name so similar to that of the plaintiff as to confuse prospective clients of the plaintiff:

2. Continuing to falsely and deceptively advertise themselves as the provider of elective abortion services and financial assistance for such services;

3. That the defendants be ordered to direct any person contacting them for abortion services to the plaintiff, Fargo Women's Health Organization, Inc., until such time as this Court orders otherwise;

4. That the court grant such other and further relief as to this Court seems just and proper.

Dated this 3d day of January, 1985.

KIRSCHNER AND BAKER LEGAL CLINIC

/s/ WILLIAM KIRSCHNER
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